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MASTER PLAN FOR REFORM AND COMBATING CORRUPTION IN THE PROCUREMENT SYSTEM OF UKRAINE

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CONTENTS

INTRODUCTION

1. This report presents an overview and assessment of the public procurement system in Ukraine, highlights its strengths and weaknesses, and makes recommendations for further development and improvement. The findings and recommendations of this report constitute the core elements of a master plan focused on combating corruption and promoting sound legal and institutional reforms aimed at that goal, including effective supervision and public scrutiny of procurement practices.

2. This report (preceded by a summary) is divided into the following four sections:

   I. The legal framework for public procurement;
   II. Institutional and organizational arrangements (including human resource aspects);
   III. Procedures and practices; and
   IV. Accountability, transparency, and anti-corruption measures.

3. Annexed to the report is a brief overview of health sector procurement that serves as a case study illustrating some points made in the report proper (Annex A). A framework of possible features of a "single-portal" Web site for public procurement (establishment of which is recommended in this report; see Annex B) is also annexed to the report. A third annex provides a suggested general timeline (roadmap) for implementation of the recommendations (Annex C). Annex D contains a list of meetings held during the preparation of this report.

4. The overall approach of this report is to measure the procurement system by referring to international standards, including: the Model Law on Procurement of the United Nations Commission on International Trade Law (hereinafter referred to as "the UNCITRAL Model Law"); the Directives of the European Union pertaining to public procurement, particularly Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts (hereinafter referred to as "the EU Procurement Directive"), and the companion EU Directive on procurement by entities in various utility sectors (hereinafter referred to as "the EU Procurement Directive [Utilities]"; to a large extent, these two directives have common procedural provisions); the WTO Agreement on Government Procurement (hereinafter referred to as "the WTO GPA"); and the *Methodology for Assessment of National Procurement Systems of the Organisation for Economic Co-operation and Development* (based on indicators from the OECD-DAC/World Bank Round Table; some of these indicators and their sub-indicators are referred to throughout the report).

5. The particular relevance of the EU Directives stems from the priority currently given to movement in the direction of harmonization with requirements applicable to EU Member States. As for the WTO GPA, the aim of this report is to help the Government of Ukraine (GOU) prepare for the upcoming negotiations concerning accession to the WTO Agreement on Government Procurement (hereinafter referred to as "the WTO GPA"). During those negotiations, the Member States of the WTO GPA will – in addition to negotiating with the Government regarding the extent to which its public procurement would be subject to the WTO GPA – engage in an examination of the procurement system of Ukraine in order to determine whether it meets the mandatory requirements of the WTO GPA (reference is therefore also made in the report to the *Checklist of Issues for Provision of Information Relating to Accession to the Agreement on Government Procurement*, WTO document GPA/35, hereinafter referred to as "the GPA Checklist" [see Annex E]).

6. The Government has committed to entering into negotiations for accession to the WTO GPA. Virtually every Member State that has acceded to the WTO in recent years has agreed to embark on negotiating accession to the WTO GPA as part of the WTO accession process. Accession to

the GPA would give access for Ukrainian companies to procurement markets in the WTO GPA Member States that they have submitted for coverage by the GPA. It is estimated that the value of public procurement subject to the WTO GPA amounts to several hundred billion dollars annually.

7. It should be noted that when reference is made in this report to specific provisions in the WTO GPA, it is to the draft revised version of the Agreement (WTO document GPA/W/297 of 11 December 2006; see Annex F). This is because pursuant to the decision of the WTO Government Procurement Committee (that oversees the GPA), accession negotiations are to be based on the revised version of the Agreement although the revised version of the GPA has not yet entered into force (see Paragraph 20-21 of the Committee's Report to the WTO General Council [GPA/89 of 11 December 2006]).

8. It should also be noted that this report does not claim to present an exhaustive comparison of the Procurement Law and international standards, but rather provides an overview that attempts to highlight the main issues. It also does not aim to provide a comprehensive master plan or strategy for generally combating corruption in government. Development of general anti-corruption assessments, plans, and strategies has been the subject of various other reports that have noted the inadequacy of the general anti-corruption framework and enforcement schemata. Rather, this report focuses on the procurement function and identifies ways in which existing legal, institutional, and procedural arrangements may be reformed with the goal of alignment with international best practices and promotion of transparency, accountability, and other basic principles of sound procurement systems in order to help curb corruption.

9. While the report presents a broad perspective on public procurement in Ukraine, it does not yet include a detailed discussion of defense-related procurement, which falls outside of the scope of the Procurement Law. However, it is important that this sector be reviewed as well, especially since it encompasses such a large proportion of procurement expenditures and is relevant from the trade perspectives of both the EU and the WTO GPA.

SUMMARY

10. The following summary presents a condensed version of the findings and key recommendations presented in this report. Overall, the report finds that while important steps have been made toward establishment of a modern public procurement system over the past decade, significant work remains to be done in order for it to meet international standards. Deficiencies in the procurement system not only have a heavy impact on the cost, quality, and integrity of procurement of large entities such as the Ministry of Health, but also have a particularly negative effect on procurement by sub-central and local government entities and the operations of private sector participants in the procurement process. First, it will be necessary to repair some serious erosion of and backsliding in the progress that had been achieved earlier in terms of the legal and institutional framework. To a certain extent, the types of legal, institutional, and other reforms recommended for improving and combating corruption in the procurement system parallel and reinforce some of the recommendations that have been as part of general assessments and strategies for combating corruption in government operations in general.

FINDINGS AND RECOMMENDATIONS ON THE LEGAL FRAMEWORK (SECTION I)

11. The legal framework for public procurement is anchored by the Law of Ukraine "On Procurement of Goods, Works, and Services for Public Funds" (hereinafter referred to as "the Procurement Law"). While the Procurement Law reflects many of the basic principles and procedures of the UNCITRAL Model Law, the EU Directives, and the WTO GPA, it still displays significant shortcomings, particularly following the latest round of amendments (which entered into effect on March 12, 2007).

12. As in the fight against governmental corruption, success in suppression of corruption in the procurement function depends in particular on the quality and comprehensiveness of the applicable legal framework. Gaps and defects in the Procurement Law pertain, for example, to the scope of application of the Law, the range of procurement methods, the manner in which institutional and organizational arrangements are established, and the lack of adequate provisions regarding conflicts of interest and corruption. It is therefore recommended that (in line with the President's statement upon signature of the latest amendments) a new version of the Procurement Law should be enacted without delay.

13. Additional major gaps in the legal framework include a lack of a consolidated set of regulations to provide detailed procedures for the implementation of the Procurement Law. It is recommended that this be done in order to consolidate and replace the myriad of sub-legislative texts that have been issued and to provide the necessary full procedural framework for the procurement process. Furthermore, standard bidding documents – including General Conditions of Contract – need to be issued by the Government free of charge (and mandatory for procuring entities) along with an official practice manual. A further significant step in filling out the legal framework for procurement and strengthening the anti-corruption agenda would be Ukraine's accession to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Various types of reforms of regulatory and permit issuance processes (e.g., the permit system for construction) that are the focus of Component 4.2 of MCC Threshold Program for Ukraine are also relevant to combating corruption in the wider procurement process.

FINDINGS AND RECOMMENDATIONS ON THE INSTITUTIONAL FRAMEWORK (SECTION II)

14. As in the fight against government corruption, success in suppression of corruption in the procurement function depends on the quality and effectiveness of the relevant institutional arrangements. In both spheres, the process of institutional development is ongoing. Ukraine was

previously on the path toward developing a modern institutional framework for policymaking and independent oversight of procurement activities. The Department of Coordination of State Procurement (DCSP) of the Ministry of Economy of Ukraine was the agency authorized to oversee the development and monitor the functioning of the procurement system. It was assigned a range of policy and oversight functions typically attributed to such an authority in accordance with international best practices, and was developing the expertise needed to fulfill such functions.

15. That positive development was interrupted in 2005 when the DCSP was abruptly disbanded and some of its functions were handed over to the Antimonopoly Committee of Ukraine (the state authority charged with regulating matters of competition), an authority with no particular expertise in regulating public procurement that has not always been successful in enforcing compliance with its own rulings. Policy and oversight functions have also been distributed to other authorities, including the Interdepartmental Commission (established by the latest amendments to the Procurement Law). Oversight of the procurement process and certain key operational functions were also assigned to the Tender Chamber, a nominally non-governmental organization created by the Procurement Law in 2005 with a membership that includes non-state sector interests. The Tender Chamber is not subject to controls that should normally be imposed on bodies exercising such functions. In addition, various other bodies exercise oversight functions.

16. In summary, the major defects in the current institutional arrangements for oversight of public procurement include the following:

(a) Policy and oversight functions are fragmented, scattered, and diluted, thus preventing effective implementation thereof.

(b) The compositions of the various oversight authorities overlap and interlock, thus compromising the independence of – and creating conflicts of interest in – oversight functions. For example, the membership of the Interdepartmental Commission at the pinnacle of the oversight function includes three representatives of the Tender Chamber, which itself performs both oversight and operational functions in the procurement process (and to which the Interdepartmental Commission is obligated to report its activities). The Commission also includes representatives of the Accounting Chamber (the supreme audit authority, reporting to the Verkhovna Rada of Ukraine), the Main Control and Revision Office of Ukraine (KRU, the main state authority for internal audit under the Cabinet of Ministers of Ukraine), and, remarkably, three representatives of the Verkhovna Rada, some deputies of which are said to be closely linked to the Tender Chamber.

(c) While purportedly a non-governmental organization for monitoring the procurement process, the Tender Chamber performs a number of key operational functions (e.g., maintaining the catalog of bidders, inscription in which is a prerequisite for a bidder to participate in a procurement proceeding; giving opinions on complaints from bidders; and publication of lists of certified Internet service providers) that are inherently governmental. Although the Chamber is supposedly a non-governmental organization, its Supervisory Council is composed of governmental and parliamentary representatives.

(d) It has also been widely alleged that the Tender Chamber is used as a vehicle for non-state sector interests that reportedly have links to the Tender Chamber and the Verkhovna Rada, particularly the Center for Tender Procedures and Business Planning (CTP) and the European Consulting Agency (ECA), to obtain and financially exploit monopoly positions in the provision of Internet publications, bidding documents, and training of Tender Committee members to the detriment of public interest; charge exorbitant prices; and coerce procuring entities and bidders to engage them to provide costly and often nonexistent procurement consulting services. Any such advisory services should be provided to procuring entities on a free basis by an authorized agency (or, if provided by private sector entities, on the basis of a

selection process in accordance with the Procurement Law). The stranglehold that the Tender Chamber has on the procurement process is compounded by the right that the Procurement Law expressly gives to the Tender Chamber to launch legal action against decisions of the Interdepartmental Commission (in which the Tender Chamber itself participates and has a large share of votes).

(e) The assignment of certain audit and control responsibilities to commercial banks by the latest amendments to the Procurement Law is also inappropriate.

17. Instead of providing arm's-length oversight and regulation of procurement activities, such oversight arrangements mix oversight and implementation functions, entangle what should be separate and independent sources of oversight, and inappropriately inject both parliamentary representatives and non-state sector interests into operational functions of the executive branch of government. Moreover, rather than controlling corruption, they seem to provide a breeding ground for it; whether this is intentional or not is immaterial at this point. Other negative effects include draining and diversion of public funds, and suppression of participation by bidders in procurement proceedings.

18. The report therefore recommends that the institutional oversight arrangements for public procurement in Ukraine should be returned to the positive track along which they had been proceeding. Oversight and implementation functions need to be separated, and the independence and consolidation of the policy and oversight functions should be restored, free of the type of parliamentary and non-state sector involvement currently in place. This may be achieved by establishing an independent policy and monitoring entity reporting directly to the Cabinet of Ministers or to the President (an approach used successfully in Poland, for example), returning the policy and oversight functions to the Ministry of Economy, or bolstering the capacity of the Antimonopoly Committee and assigning the full range of policy and oversight functions to it. The functions of the Interdepartmental Commission should be limited to providing independent review of bidders' complaints, and (possibly) debarment of suppliers, contractors, and consultants in order to strengthen the independence of the complaint review procedure. The Tender Chamber – to the extent to which it is retained – should be converted into a true non-governmental organization along the lines of Procurement Watch Inc. in the Philippines, for example.

19. The report also emphasizes the need for development of organizational arrangements within procuring entities and sustained capacity building with the goal of building a professional procurement cadre, developing improved automated systems for collection of statistical data on public procurement, and implementing an ongoing and graduated capacity-building program for both the operational and oversight cadres in the system.

FINDINGS AND RECOMMENDATIONS ON PROCEDURES AND PRACTICES (SECTION III)

20. A number of gaps and defects in the procedures and practices applied in the procurement process need to be addressed. Particularly noteworthy is the need to establish an official single-portal Web site through which to conduct Internet publication of procurement information mandated by the Procurement Law. Such an approach would bolster transparency and facilitate access to information about procurement activities. That would be in line with the general need to improve transparency and access to information about government activities that have been identified as essential elements of an effective strategy for combating corruption in government affairs.

21. The provisions in the Procurement Law for Internet publication authorize each procuring entity to select its own Internet service provider (ISP) provided that the service provider has been certified as meeting requirements set in the Law, a process in which the Tender Chamber plays a role. Furthermore, a particular consulting company (already referred to above) that is reported to have ties to the Tender Chamber happens to own the sole ISP that has been certified. It is reported to

have leveraged that monopoly position to pressure procuring entities to engage its consulting services.

22. Thus, the Internet publication requirements as presently formulated are an obstacle rather than an advantage for good public procurement and have served to bleed money from the procurement system and subvert the basic objectives of public procurement. Attempts by the Antimonopoly Committee of Ukraine to suppress such practices have been unsuccessful. An official single-portal Web site should be established to break the stranglehold effect of the present system.

23. Other priorities include providing capacity building and improved procedures for procurement planning and supply chain management; removal of the "price reduction" procedure that calls on the lowest-priced bidder to reduce his bid price as well as removal of the "reduction of price procedure" (a reverse auction procedure that does not have the anonymity associated with the electronic reverse auction procedure), since those procedures distort the essence of bidding and can facilitate collusion among bidders; addition of a specialized method for procurement of consultant services; improvement of capacity and practices for formulation of technical descriptions and specifications; lengthening the minimum time periods for submission of bids; reviewing bid security requirements and introducing alternatives in order to lessen the burden on small businesses; introduction of more objective practices for evaluation of bids; consolidation of the register of participants in bidding and the catalog of participants as well as designation of a government authority to act as the administrator; greater restriction of cancellation of procurement proceedings; and introduction of standards and a strategic implementation process for electronic procurement.

FINDINGS AND RECOMMENDATIONS ON ACCOUNTABILITY, TRANSPARENCY, AND ANTI-CORRUPTION MEASURES (SECTION IV)

24. The oversight difficulties cited above flow from an inbred and ineffectual oversight system fraught with conflicts of interest. These are compounded by a weak and underdeveloped framework for rules of conduct for the procurement process (including conflicts of interest) and their enforcement as well as the underdeveloped nature of the anti-corruption framework in general. In this case as well, the existing procurement system displays weaknesses that have been identified as lacunae to be addressed generally in the fight against government corruption. Hence, this report recommends that the next version of the Procurement Law should include a code of conduct specific to the context of procurement for procurement officials as well as bidders, contractors, and other participants, and that sanctions for violations of procurement should be stiffened.

25. The report recommends that the administrative review procedure be assigned to a body that is truly independent and not compromised by operational involvement in conducting procurement proceedings or by its composition. It is also recommended that further procedural details for the complaint procedure should be elaborated and brought into alignment with international standards. Strengthening the complaint review procedure would bolster the effectiveness of a key mechanism that would contribute significantly to fighting corruption in the procurement function. In addition, the report recommends that the procedure for debarment (blacklisting) of bidders should be further elaborated to ensure due process.

26. In conclusion, the report recommends launching a public awareness campaign with the goal of mainstreaming basic public procurement objectives of economy and efficiency, transparency, accountability, and integrity.

FINDINGS AND RECOMMENDATIONS ON PUBLIC PROCUREMENT IN THE HEALTH SECTOR (ANNEX A)

27. In Annex A, the report pays particular attention to public procurement in the health sector. It is found that many of the problems and challenges faced by the procurement system in general are

evident – and in some cases exacerbated – in the health sector. At the same time, various factors specific to and complicating procurement appear in the health sector (e.g., the transitional state of the health care system that has led to many challenges in terms of organization, services, capacity, and financing; particularly high rates of HIV and tuberculosis that raise serious procurement challenges, and the continuing medical legacy of the Chernobyl nuclear catastrophe; weaknesses in terms of forecasting needs and procurement planning; capacity shortfalls in the Ministry of Health; restrictive rules and practices that limit competition, jeopardize quality, and significantly elevate prices in health sector procurement, including requirements for suppliers to be registered in Ukraine; weakness in domestic health sector production and domination of the market by resellers; and non-transparent and corrupt practices in the procurement process as well as in the process of registering pharmaceuticals for use in Ukraine).

28. In the light of the findings of this and other reports and the society-wide health implications of any deficiencies in health-sector procurement, priority attention will need to be paid to this sector in furthering the procurement reform process. Priority steps that need to be taken to address the problems referred to in Annex A include: opening up health sector procurement to greater competition (in particular, by eliminating any rules or practices that limit the procurement process to suppliers registered in Ukraine); establishing safeguards to ensure that technical specifications are formulated in an objective, non-discriminatory manner and that the approved technical specifications are not subsequently modified upon issuance of bidding documents; developing improved capacity and procedures for forecasting needs and procurement planning; protecting the confidentiality of bids prior to their opening, promoting transparency by publicizing full information about the results of procurement proceedings (including price information); and correcting and eliminating corruption in ancillary processes, particularly the registration process for pharmaceuticals.

MASTER PLAN FOR REFORM AND COMBATING CORRUPTION IN THE PROCUREMENT SYSTEM OF UKRAINE

29. Further reform of the procurement system in Ukraine is a basic component of a comprehensive anti-corruption strategy for the country. Procurement reform is an essential ingredient for combating corruption because the expenditure of large amounts of state funds is involved. Moreover, the procurement system in Ukraine displays – to one extent or another – a number of important conditions and characteristics that may spawn or facilitate corrupt practices in procurement as well as in other sectors and governmental functions where such conditions and characteristics may appear. Those include[1]:

(a) Inadequacy of the legal framework;
(b) Weakness and fragmentation in the institutional oversight arrangements and control mechanisms, including parliamentary oversight;
(c) Inadequate accountability measures
(d) Inadequate transparency and difficulties in access to information;
(e) Incidents of collusion between state officials and powerful private sector interests;
(f) The possibility of excessive discretion being accorded to governmental officials, thus creating opportunities for rent-seeking behavior; and
(g) General tolerance for corruption and low levels of civil society monitoring.

30. The reforms recommended in this report address how these and other conditions that facilitate corruption may be decreased in the procurement system.

31. The existing deficiencies and problems in the procurement system have a high impact not only on the procurement of large entities such as the Ministry of Health, but also on the procurement activities of sub-central and local government authorities and small businesses in particular. They have complained about the increased costs and delays as well as decreased competition that have resulted from the constellation of dubious institutional and oversight arrangements introduced in recent years and the corrupt and inefficient practices that have arisen therefrom.

I. LEGAL FRAMEWORK

32. A fundamental, indispensable prerequisite for reducing corruption in procurement is to put a comprehensive, modern legal framework for the procurement process into place. At the same time, one of the major weaknesses that have been identified in assessments of and strategies for combating government corruption in Ukraine is the lack of an adequate, modern legal framework for addressing corruption issues.[2] A similar critique may be made of the procurement system in Ukraine, since the applicable legal framework needs to be developed and improved further in order to provide an adequate legal foundation for promoting best practices and curbing corruption in procurement activities.

[1] USAID, *Corruption Assessment: Ukraine. Final Report* (February 10, 2006).
[2] USAID, *Corruption Assessment: Ukraine. Final Report* (February 10, 2006).

A. JURIDICAL LEVEL OF THE LEGAL FRAMEWORK

33. The legal framework for public procurement in Ukraine – at least in the case of public procurement for non-defense purposes – is anchored by the Law of Ukraine "On Procurement of Goods, Works, and Services for Public Funds" (initially enacted in 2000 and subjected to a succession of subsequent amendments; hereinafter referred to as "the Procurement Law").[3] This reflects the best practice of basing the legal framework for public procurement on an instrument at the statutory level rather than relying primarily on instruments of a juridically lower level of authority such as administratively issued regulations.

34. To a measurable extent, the Procurement Law reflects the basic principles and procedures articulated in the Model Law on Procurement formulated by the United Nations Commission on International Trade Law (hereinafter referred to as "the UNCITRAL Model Law"). In addition, there is substantial common ground with basic principles and procedures in the EU regime applicable to public procurement that was reflected in particular by Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts (hereinafter referred to as "the EU Procurement Directive"). The same can be said of the significant commonality between the Procurement Law and the WTO Agreement on Government Procurement (hereinafter referred to as "the WTO GPA"). At the same time, there are substantial aspects of discrepancy between the Procurement Law and those international standards that need to be addressed before it can be said that the Procurement Law is aligned with them.

B. SCOPE OF THE LEGAL FRAMEWORK

35. The scope of application of the legal framework is a fundamental measure of its adequacy (see OECD Sub-indicator 1[a]) and particularly relevant to measuring the extent to which it lines up with obligations under the GPA (see GPA Checklist Question 1) and the EU procurement systems.

36. In certain respects, the Procurement Law has a broad scope of application in that it applies to the following:

    (a) Procurement of goods, works, and services;

    (b) Procurement by entities at all levels of public administration in Ukraine, including central government, oblast, and municipal authorities; and

    (c) Procurement by public enterprises in which the state holds an interest of at least 50 percent.

37. The most recent amendments to the Procurement Law that entered into force on March 12, 2007 have granted covered public enterprises greater flexibility with regard to certain required procedures (e.g., raising thresholds with regards to required use of the open bidding method). The more flexible treatment accorded to public enterprises will have to be considered in light of the requirements of the GPA as well as the EU regime for public procurement to the extent that those instruments may accord any differential treatment for public enterprises (e.g., the EU includes a special instrument applicable to entities operating in the utilities sector, Directive 2004/17/EC of 31 March 2004, which coordinates the procurement procedures of entities operating in the water, energy, transport, and postal service sectors).

38. Following the latest round of amendments in particular, the Procurement Law (Article 2) has a rather long list of exclusions from its scope of application. Foremost among those is procurement "carried out by enterprises of the defense-industrial complex." The main instrument in that sphere is the Law of Ukraine "On State Defense Order" No. 464-XIV of 3 March 1999. The present report does not include any assessment of the adequacy of that Law. However, it may be noted that the experiences of other countries have shown that broad exclusion of defense procurement

[3] *Vidomosti Verkhovnoyi Rady* (VVR), 2000, No. 20: 148. Amendments: No. 434-IV (434-15) of January 16, 2003; No. 1047-IV (1047-15) of July 9, 2003; No. 1158-IV (1158-15) of September 11, 2003; No. 1294-IV (1294-15) of November 20, 2003; No. 2188-IV (2188-15) of November 18, 2004; No. 2229-IV (2229-15) of December 14, 2004; No. 2377-IV (2377-15) of January 20, 2005; No. 2664-IV (2664-15) of June 16, 2005); and No. 424-16, which came into force on March 11, 2007.

from standard procurement rules and procedures substantially increases the risk of inefficiency and abuse in defense procurement.

39. Moreover, in subsequent activities conducted in preparation for negotiation of accession to the GPA and alignment of the procurement system with the EU procurement regime, an assessment of the procedures and principles applicable to defense-related procurement in Ukraine will be relevant to the extent that defense-related procurement is subjected to those instruments without any particular special treatment. Furthermore, there may be no reason to continue to exclude such procurement in a blanket fashion from the main legal framework for public procurement, particularly because a large proportion of defense-related procurement does not raise any need for special treatment by its nature.

40. In a similar issue, in addition to diminishing the extent to which the basic objectives of sound public expenditure management and mainstreaming public procurement are achieved, the large list of exclusions from the scope of application of the Procurement Law may complicate the GPA accession process and subtract from alignment of the procurement system with the EU regime. Such broad exclusions also diminish the effectiveness of anti-corruption objectives and measures for the procurement system.

41. A number of types of procurement relevant to the energy, postal, and telecommunications sectors are among the various other exclusions listed in the Procurement Law (Article 2[3]). Some of those exclusions might be questioned from the standpoint of alignment with the EU procurement regime, since procurements of those types fall within the scope of the EU Procurement Directive (Utilities) in one way or another (i.e., entities operating in the water, energy, transport, and postal service sectors are covered by the Directive; although entities operating in the telecommunications sector are not covered by the Directive, procurement of various telecommunications services by contracting authorities is generally subject to that Directive).

42. Another scope-related question relevant to comparison of the Procurement Law with the EU Directives is the understanding of the terms "contracting party," "enterprises," and "spending units" as defined by the Procurement Law (Article 1). The gist of the scope-related provisions and definitions in the Procurement Law is that the Law applies to enterprises in which the state has a greater than 50-percent interest, though more flexible procedures are allowed for enterprises by virtue of the latest amendments to the Procurement Law (e.g., the thresholds for application of the Procurement Law to enterprises are higher than for other procuring entities subject to the Law).

43. The relevant provisions in the EU Procurement Directive (Article 9) define the term "contracting authority." The EU definition encompasses entities "governed by public law"; the definition of "governed by public law" is predicated, *inter alia*, on an entity being "established for the specific purpose of meetings needs in the general interest, not having an industrial or commercial character." The level of public financing of the entity is an additional, cumulative criterion, though other criteria may also trigger application of the EU Procurement Directive (e.g., management supervision by a state authority; see EU Procurement Directive, Article 9[c]). Such additional criteria are not mentioned in the Procurement Law, which may result in a misalignment in terms of scope.

44. The Procurement Law accords special and more flexible treatment regarding enterprise procurement of materials for development and production of industrial and consumer goods (Article 2[5, 8]). That type of procurement is excluded from the scope of the WTO GPA (Article II[2][a][ii]).

45. A small but potentially significant nuance is found in the vocabulary used to define the scope of application of the Procurement Law. The definition of the term "state procurement" is predicated on the expenditure of state funds (sometimes also referred to as "public funds"). That may suggest exclusion of any means of acquisition not involving the expenditure of state funds, e.g., acquisition of public infrastructure on the basis of private investment in a "build-operate-transfer" (BOT) contracting arrangement that falls within a broad category of arrangements of this type sometimes referred to broadly as "concessions." By contrast, the GPA (Article II[2][b]) defines procurement

more broadly as acquisition "by any contractual means." The EU Procurement Directive expressly applies to concession contracts in which there may not be any actual payment by the procuring entity to its contractual counterpart (although services concessions are excluded to one extent or another by the EU Procurement Directive [Article 17] and the EU Procurement Directive [Utilities], Article 18). That crystallizes the question as to the regime that applies to procurement of such concession contracts in Ukraine.

46. Another potential gap in the Procurement Law *vis-à-vis* the EU Procurement Directive concerns rules applicable to design contests. While the Procurement Law (Article 33[2], first subparagraph) refers awarding a contract following a design contest as one of the justifiable cases of single-source procurement, no procedures are provided to be applied in design contests. By contrast, the EU Procurement Directive (Articles 66-74) sets forth basic procedural requirements for design contests.

47. Yet another significant gap in the Procurement Law *vis-à-vis* the EU Procurement Directive derives from rather fragmented and incomplete treatment of the application of the Internet and other modern information and communications technology to the procurement process by the Procurement Law.

48. From the standpoint of harmonization with the WTO GPA and the EU Procurement Directive, Article 4 of the Procurement Law (patterned on the UNCITRAL Model Law [Article 3]) is salutary. It stipulates that procurement-related requirements imposed by treaty-level obligations of Ukraine take precedence over conflicting provisions in the Procurement Law.

C. CONSOLIDATION AND ELABORATION OF THE LEGAL FRAMEWORK

49. An important criterion for measuring the clarity, internal consistency, and transparency of the legal framework is the extent to which the framework is consolidated and limits any uncertainty as to the hierarchy of its component instruments (see OECD Sub-indicator 1[a]). The legal framework for public procurement in Ukraine has been characterized by a multiplicity of instruments that have accumulated over the years, including many potentially overlapping instruments at the sub-legislative level. Such a multiplicity of instruments increases the likelihood that the relationship, consistency, and hierarchy of those instruments will not be clear to end users and that there will be fragmentation and inconsistency in the legal framework for public procurement.

50. The drawbacks of such a legal environment have been compounded in Ukraine by the apparent withdrawal of certain instruments upon the removal of the Ministry of Economy from its former regulatory role in the sphere of public procurement. This has exacerbated the already existing problem of insufficient detail in the legal framework regarding implementation of procedures introduced in a general manner in the Procurement Law.

51. Consolidation of the legal framework – as well as its completion – would be best achieved through replacement of a large part of the multiplicity of sub-legislative texts that have been issued with a set of consolidated regulations providing detailed rules and procedures for implementation of the procurement process (see OECD Sub-indicator 2[a]). While it calls for issuance of regulations, the Procurement Law does not specifically identify the authority responsible for issuance of said regulations.

52. A further significant step in completing the legislative framework for procurement and strengthening the anti-corruption agenda would be accession by Ukraine to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

D. STANDARD BIDDING DOCUMENTS

53. One of the most important tools for promoting proper uniform implementation, efficiency, transparency, integrity, and predictability in modern procurement systems is the central issuance and mandatory use of standard bidding documents (SBDs) by procuring entities, including General Conditions of Contract (GCC); see OECD Sub-indicators 2(b) and (f).

54. Much to the detriment of the Ukrainian procurement system, such SBDs have yet to be issued even though a draft set of SBDs has been prepared with World Bank-funded technical assistance via a grant from the Government of the Kingdom of the Netherlands. It is reported that those draft SBDs – based closely on World Bank SBDs – were found to be the subject of a questionable copyright obtained by an NGO (the Center for Tender Procedures and Business Planning, or CTP) and exploited by a private sector consulting company (the European Consulting Agency, or ECA) that was able to take advantage of its links to the Tender Chamber and utilize those SBDs in a profit-making scheme.

55. The aborted development and distorted application of SBDs in Ukraine has harmed the interests of procuring entities as well as bidders and led to depression of competition in procurement proceedings. Official issuance of SBDs to be made available to and used by procuring entities free of charge remains a priority step to be taken in the development of the Ukrainian public procurement system. A similar fate seems to have befallen earlier attempts to issue an official practice manual for use by procuring entities.

E. A BROADER LEGAL FRAMEWORK

56. The legal framework for arbitration is particularly relevant in the broader legal context for implementation of the procurement process. Ukraine is listed as one of the states that have enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration. However, proper practice of arbitration in public procurement is hindered somewhat by the lack of SBDs (including the lack of GCCs with uniform, properly formulated arbitration clauses).

57. From the standpoint of a broader strategy for combating corruption in the procurement process, reforms are needed to streamline and enforce regulations. A particularly relevant area is the permit system for construction, including licensing of and permit issuance for construction and architectural companies. Such reforms are the subject of Component 4.2 of the MCC Threshold Program for Ukraine.

F. MAIN RECOMMENDATIONS FOR THE LEGAL FRAMEWORK

58. The main recommendations for the legal framework are as follows:

(1) Revise or replace the Procurement Law to address the problems identified in this and other assessments that have recently been conducted (including for purposes of alignment with EU and WTO GPA procurement principles);

(2) Review and reduce the number of exceptions to the scope of application of the Procurement Law, including for purposes of alignment with EU and WTO GPA procurement principles;

(3) Consolidate and complete the legal framework for public procurement by issuing a consolidated set of regulations, providing uniform detailed procedures for implementation of the Procurement Law;

(4) Accede to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;

(5) Complete the legal framework through government issuance of standard bidding documents, including General Conditions of Contract that are mandatory for procuring entities and available free of charge without any copyright restrictions or fees imposed (if possible, using the draft SBDs prepared at an earlier stage); and

(6) Prepare and issue an official practice manual (if possible, using the draft manual prepared at an earlier stage) free of charge to procuring entities.

II. INSTITUTIONAL FRAMEWORK

A. CENTRAL POLICY AND OVERSIGHT FUNCTIONS

59. Another basic component of the struggle against government corruption is the establishment of effective institutional machinery to prevent, monitor, detect, and sanction corrupt practices.[4] Here again, there are parallels with the procurement system. In particular, the development of effective institutional and organizational arrangements for oversight and policy making for public procurement has been a crucial part of the construction of the Ukrainian procurement system. Such arrangements would be an indispensable part of the measures needed for the effective monitoring and suppression of corruption risks in the procurement process.

60. A basic feature of the procurement reform process that has been taking place in numerous countries (including Ukraine) over the past decade has been the development of an independent, central policy and oversight functions for the procurement system as a whole. Those functions include the following steps in particular: monitoring the overall performance of the procurement system, guiding its development, reporting to high-level government authorities on public procurement, fostering capacity development, developing and updating the legal framework (e.g., by preparing SBDs), providing technical guidance to procuring entities (at no cost) on interpretation and implementation of the procurement process, and facilitating the introduction of innovative practices such as electronic procurement (see OECD Sub-indicator 4[b]).

61. Moreover, the existence and effective implementation of such central policy and oversight functions is crucial for implementing various obligations flowing from the WTO GPA and the EU Procurement Directives (for example, see GPA Checklist Question 36).

62. In order to ensure that the status and legal basis of such functions are sufficient in order to permit them to be implemented effectively, it is highly desirable that they be established and allocated in the state administrative structure pursuant to the legal and regulatory framework governing public procurement (see OECD Sub-indicator 4[a]).

63. Thus, successive versions of the Procurement Law have dealt with the question of identification and allocation of central policy and oversight functions for the procurement system. Prior to the December 2006 amendments (due to enter into effect on March 12, 2007), the Procurement Law simply stipulated that those functions would be performed by the "Authorized Agency" designated by the government.

64. Until the latter part of 2005, the "Authorized Agency" had been the DCSP of the Ministry of Economy of Ukraine. The DCSP had been functioning as the type of central policy and oversight authority envisaged in terms of best practices and had begun to develop considerable expertise when its role was abruptly eliminated and some of its functions were transferred to the Antimonopoly Committee (AMC). The allocation of central policy and monitoring functions for the procurement system to a regulatory authority with no specific expertise in the sphere of public procurement (albeit one that should perform an important market regulation function) is rather unusual. Compounded by failure to allocate the resources and expertise needed to perform its new functions to the AMC and the loss of the expertise that had been accumulated by the MOE, this change represents a significant step backward in the evolution of the institutional arrangements for public procurement in Ukraine.

65. The latest version of the Procurement Law enshrines the designation of the AMC as the "Authorized Agency" but does not allocate the full range of functions that are typically granted to such an authority. For example, its functions do not include issuance of SBDs, granting authorizations for resorting to alternative methods of procurement (such as single-source procurement), or ruling on complaints from bidders (a function attributed in various countries to a central procurement policy and oversight authority). In fact, the AMC is mostly confined to

[4] For example, see USAID, *Corruption Assessment: Ukraine. Final Report* (February 10, 2006).

preparing reports. An additional, higher level of authority, the Interdepartmental Commission, has been created and assigned key functions including authorizing use of alternative procurement methods and making decisions on complaints from bidders.

66. One of the basic attributes of the central policy and oversight authority for public procurement should be its independence from operational involvement in the procurement process as well as its separation from other authorities that perform other oversight functions related to the procurement process (see OECD Sub-indicator 4[c]). Such a separation of oversight and implementation is also a basic tenet of anti-corruption programs. However, the aforementioned developments together with other emerging institutional arrangements for governance of the procurement process compromise independence, fragment authority, and institutionalize serious conflicts of interest.

B. INTERDEPARTMENTAL COMMISSION ON PUBLIC PROCUREMENT

67. The most recent amendments to the Procurement Law (Article 3-3) established the Interdepartmental Commission on Public Procurement. The Interdepartmental Commission takes the place of the special Control Commission on Public Procurement, which has operated in organizational proximity to – but independently from – the Accounting Chamber. The Procurement Law (Article 3-3) assigns a number of key functions in the oversight of the procurement process to the Interdepartmental Commission (e.g., issuing waivers for the use of the restricted bidding and single-source procurement methods, considering and making decisions on complaints from bidders, maintaining the list of blacklisted Tender Committee members and the list of debarred bidders, introducing innovative procurement practices, certification of procurement trainers, and certification of procurement training institutions). In addition, the Interdepartmental Commission is given a number of rather vaguely worded functions (e.g., "promote the creation of conditions for transparency in the procurement area").

68. Most of the functions assigned to the Interdepartmental Commission are those typically performed in other countries by central procurement policy and monitoring authorities as discussed above. In fact, the expanded list of functions assigned to the Interdepartmental Commission substantially exceeds the functions given to the AMC. That situation seems to have created serious fragmentation of authority over the procurement system without a substantial management rationale.

69. Paragraph 5 emphasizes the need for the Interdepartmental Commission to function in an independent manner. That is in line with the procurement reform principle that policy and monitoring functions should be independent (see OECD Sub-indicator 4[c]). However, the independence of the Interdepartmental Commission is compromised by its composition, which consists of representatives of other authorities that are already involved in the oversight of the procurement process themselves (one representative from each of the following: the Accounting Chamber of Ukraine, the Main Control and Revision Office of Ukraine, the State Treasury of Ukraine, the Antimonopoly Committee, and the Ministry of Economy). Three representatives will be included from each of the following authorities: the Ukrainian parliament (Verkhovna Rada) and the Tender Chamber (the controversial role of this entity in the procurement process is discussed below). This effectively gives the Verkhovna Rada and the Tender Chamber combined control of the Interdepartmental Commission. Moreover, the participation of these authorities in the Interdepartmental Commission also compromises the independence of the oversight and audit functions that they perform over procurement activities. Furthermore, the participation of the Tender Chamber and the Verkhovna Rada inappropriately injects non-state sector and parliamentary representatives into implementation of inherently governmental functions of the executive branch of government.

70. Moreover, the Procurement Law requires the Interdepartmental Commission to report its decisions to the Tender Chamber, an unaccountable, non-state body. An additional contradiction and conflict in the structure of the Interdepartmental Commission is the right that the Procurement Law expressly gives to the Tender Chamber to bring legal action in the courts

against decisions of the Interdepartmental Commission, this despite the fact that the Tender Chamber participates in that part of decision making and has a large share of the votes.

71. The composition of the Interdepartmental Commission illustrates the inbred and interlocking character of the institutional arrangements for policymaking and oversight of the procurement system. It seems that everywhere one turns, the same entities are involved in policing the procurement system as well as policing themselves in policing and implementing the procurement system. Such a mixture of various elements of oversight and well as of implementation functions in the procurement system is not in line with the general anti-corruption principle of separation of oversight and implementation functions.[5]

72. Moreover, these interlocking and overlapping oversight and implementation arrangements may contribute to one extent or another to the possibility that corrupt practices and other abuses may be carried on with impunity. They also may provide a fertile ground for other types of weaknesses seen in anti-corruption efforts, including limited enforcement actions, enforcement only against minor figures (while powerful individuals are not prosecuted), and selective use of enforcement mechanisms (including for political retribution).[6]

73. Therefore, it is hardly surprising that in a state of such institutional malaise lacking in independent oversight, well-positioned private sector operators reputedly linked to the Tender Chamber and the Verkhovna Rada are able to manipulate the system (as is said to have occurred in the case of the standard bidding documents described above). Institutional and oversight arrangements of this character run directly counter to internally recognized principles of good governance in the procurement sphere (see OECD Sub-indicator 4[d]) as well as basic, generally applicable anti-corruption principles. These include the anti-corruption principle of effective parliamentary oversight, which is compromised to the extent that the Verkhovna Rada (by virtue of its membership in the Interdepartmental Commission) is involved in implementing the very activities that it is supposed to be overseeing.

C. OTHER OFFICIAL CONTROL BODIES

74. External control/oversight of the procurement process is also exercised by a number of additional entities apart from the Antimonopoly Committee and the Interdepartmental Commission (Article 3-2). Those include the Main Control and Revision Office of Ukraine (KRU), the State Treasury, the Ministry of Agrarian Policy, the authorized central executive body for statistics, and law-enforcement authorities. The organization, legal framework, timeliness, and effectiveness of such external oversight functions as well as those of internal oversight mechanisms are key indicators of the effectiveness and integrity of a procurement system (see OECD Sub-indicators 9[a-e]).

75. A question has been raised as to whether the legal framework for the various additional authorities exercising procurement oversight has been updated to reflect the functions allotted to them by the Procurement Law. In terms of timeliness (see OECD Sub-indicator 9[c]), only the oversight exercised by the State Treasury (linked to verification of compliance prior to implementation of payment) is anything other than an *ex post* review, thus limiting the extent to which control functions allow a timely management response.

76. As with the operational dimension of public procurement, internal and external oversight could be improved by capacity-building programs for the officials concerned (see OECD Sub-indicator 9[e]).

D. NON-STATE SECTOR INVOLVEMENT IN ADMINISTRATION OF PUBLIC PROCUREMENT

77. Another basic element in a strategy for combating governmental corruption is to provide opportunities and mechanisms for oversight and policy input by civil society and other stakeholders.[7] While some elements of this type of civil society and stakeholder involvement have surfaced in the Ukrainian procurement system, they are characterized by a number of distortions

[5] USAID, *Corruption Assessment: Ukraine. Final Report* (February 10, 2006).

[6] USAID, *Corruption Assessment: Ukraine. Final Report* (February 10, 2006), 13.

[7] USAID, *Corruption Assessment: Ukraine. Final Report* (February 10, 2006).

and disadvantages that undermine rather than promote anti-corruption measures and other objectives of civil society and stakeholder involvement.

78. While the experiences of various countries have underscored the valuable roles that civil society and the private entrepreneurial sector can play in monitoring the compliance of procurement activities through required rules and procedures and consultation regarding possible improvements to governmental procurement systems, public procurement remains an inherently governmental function. In contrast, the institutional arrangements that have evolved in recent years in Ukraine represent a transfer of certain inherently governmental functions related to the procurement process to the non-state sector. Not only has that fragmented policymaking and oversight authority, it apparently has created fertile ground for manipulation and corruption of the procurement process.

79. The 2005 amendments to the Procurement Law established the Tender Chamber as a civil society umbrella organization charged with monitoring and promoting transparency and compliance in the procurement system. At the same time, the Tender Chamber – a body with a natural and understandable interest in promoting the interests of its non-state sector members – was endowed with a number of key functions that should be considered inherently governmental functions that may not be transferred to a non-governmental entity (e.g., granting waivers for use of alternative procurement methods and playing a decisive role in deciding upon complaints from bidders).

80. Widespread dissatisfaction with the authority given to the Tender Chamber has been compounded by the opportunity that it seems to provide to certain non-state sector interests to engage in schemes that have a very negative impact on the procurement process. These include the Center for Tender Procedures and Business Planning (CTP) NGO, which has managed to obtain a copyright and charge burdensome fees for standard bidding documents virtually identical to those issued by the World Bank); the European Consulting Agency (ECA), a consulting company said to be linked to and exercising considerable influence in the Tender Chamber's membership and leadership echelons in order to create a lucrative and essentially monopolistic market in providing Internet publication of notices in electronic form while using said monopoly to pressure entities and bidders into contracting with them to provide costly procurement consulting services (which in many cases are reported to amount to no services at all).[8]

81. Both procuring entities and bidders have complained about the dubious role of the Tender Chamber as a regulator of public procurement and have alleged that rather than serving as an arm's-length monitor, it has served as a vehicle for manipulation and exploitation of the procurement process by well-positioned non-state interests, thus unjustifiably raising the costs of procurement proceedings for procuring entities and bidders alike.

82. Questions about the Tender Chamber (such as those referred to above) have also been raised in the context of regional anti-corruption initiatives. Pursuant to participation by Ukraine in the Istanbul Anti-Corruption Action Plan, an assessment of Ukraine's implementation of the relevant recommendations raised concerns about the opportunities for corruption created by the nature and functions of the Tender Chamber.[9]

83. Questions raised about the Tender Chamber have led to the modification and supposed curtailment of its administrative functions (e.g., according to the most recent amendments to the Procurement Law, the Tender Chamber is to take on a more advisory rather than a decision-

[8] Another alleged corrupt practice by the ECA is use of false companies created by the ECA that have not participated in a procurement proceeding to file spurious challenges to the proceeding when the winner of the proceedings refuses to pay the ECA 10 percent of the contract price. This scheme is said to be enabled by the refusal of the Tender Chamber to recognize the results of proceedings, which then prompts lodging of challenges. The ECA also reportedly exercises an effective monopoly in providing required trainings to members of Tender Committees at a fee of 1,500 UAH per trainee.

[9] Anti-Corruption Network for Eastern Europe and Central Asia (ACN), *Monitoring of National Actions to Implement Recommendations Endorsed During the Reviews of Legal and Institutional Frameworks for the Fight against Corruption: Ukraine Monitoring Report* (Adopted at the 6th Monitoring Meeting of the Istanbul Anti-Corruption Action Plan on 12 December 2006 at the OECD Headquarters in Paris), 8.

making role in matters such as complaints from bidders). Nevertheless, the Tender Chamber remains a formidable presence on the procurement scene, and it may be argued that the most recent amendments to the Procurement Law have in fact enhanced the power of the Tender Chamber. For example, as noted above, the Tender Chamber has been expressly given the right to take legal action against decisions of the Interdepartmental Commission (in which the Tender Chamber is a key participant itself).

84. Furthermore, the Tender Chamber is responsible for maintaining a catalog of bidders (inscription in which is a prerequisite for eligibility to participate in procurement proceedings; see Paragraphs 115-121 below). Moreover, the Tender Chamber continues to play a large role in print and electronic publication of procurement notices (in connection with which the Tender Chamber is empowered to block publication when it determines that a violation has taken place), thus giving it additional leverage in implementation of public procurement.

85. It is noteworthy that the Tender Chamber, which purports to be a non-governmental organization, has a Supervisory Council that – pursuant to the Procurement Law – is composed of representatives of government agencies and parliamentary authorities that are already involved in oversight if not the operation of the procurement system (three representatives from the Antimonopoly Committee of Ukraine and one representative each from the Ministry of Finance of Ukraine, Ministry of Justice of Ukraine, Main Control and Revision Office of Ukraine, Accounting Chamber of Ukraine, State Treasury of Ukraine, and three Verkhovna Rada deputies by petition of a corresponding parliamentary committee concerning regulation of the public procurement market).

86. Here again one sees the inbred, interlocking, and overlapping character of the institutional arrangements that are in place for oversight of the procurement system, the independence of which is compromised by clear, built-in institutional and functional conflicts of interest. The inappropriate intrusion of the legislative branch into the operational sphere that is the rightful province of the executive branch of government has also become apparent once again.

87. The deleterious effects of the aforementioned constellation of circumstances, arrangements, and legislative provisions on the procurement system are significant. It is ironic that one of the main obstacles to the efficient implementation of the procurement process and the progressive development of the procurement system is the manner in which the otherwise positive notion of required Internet publication of procurement information has been set up. Instead of calling for the establishment of a single-portal, official Web site for public procurement, the Procurement Law requires that each procuring entity is to select an Internet service provider (ISP) but that the ISP must be one that has been certified to meet the requirements set forth in the Procurement Law.

88. Only one ISP has been certified, and it happens to be owned by a consulting company (the European Consulting Agency) that has been linked to the Tender Chamber. This situation has been reported to result in procuring entities being pressured into contracting for consulting services as a *de facto* condition for obtaining the required Internet publication services. The pressure on procuring entities is enhanced by the provision in the Procurement Law that failure to publish on the Internet results in invalidation of the procurement proceeding. In return for these consulting services, the procuring entity is to pay a substantial fee based on a percentage of the value of the procurement.

89. If it is to be retained, the Tender Chamber should be converted into a true non-governmental, civil society watchdog organization that is not involved operationally in the procurement process. A good example of the positive role that such an organization can play is Procurement Watch Inc., an organization in the Philippines.

90. Another example of inappropriate non-state sector involvement in implementation of the procurement process is the provisions in the Procurement Law that call for commercial banks (in the case of procurement by enterprises subject to the Law) to scrutinize compliance by procuring entities as a precondition to making payments under procurement contracts.

E. COLLECTING INFORMATION AND MEASURING PERFORMANCE

91. Collection of statistical and other data on procurement activities is a fundamental prerequisite for enabling access to the type of information needed by oversight entities, civil society organizations, and other stakeholders to monitor the procurement system (including for anti-corruption purposes). Strengthening the system for collecting such information is therefore a key anti-corruption measure.[10]

92. The capacity of a procurement system to generate and assemble statistical information on procurement activities is an important measure of quality management and oversight procedures (see OECD Sub-indicator 5(b), which provides a good model for the types of information to be collected).

    In addition, collection of such information is necessary to fulfill reporting obligations under the WTO GPA as well as such obligations of Member States of the EU. Thus, the provisions and procedures for collection of information (for example, see Article 3-2 of the Procurement Law, which refers to the role of the central state authority on statistics) will constitute an important measure of alignment with WTO GPA and EU requirements.

93. Further reform of the procurement system in tandem with the introduction of various phases of electronic procurement is expected to lead to the replacement of existing systems of manual collation and transmission of data by procuring entities with an automated system of data collection and generation of reports.

94. In addition to bolstering the information gathering and reporting capacity of the procurement system, periodic assessment of the performance and compliance of individual procuring entities and of the system as a whole should be introduced as a related measure to aid in the anti-corruption fight. Measures and indicators used for such assessments (which could be performed by procuring entities themselves as well as by an external body such as the "Authorized Agency") could be based on indicators of the type developed by OECD/DAC referred to elsewhere in this report. Such an exercise would provide benchmarks to be used in determining the progress made in the development of the procurement system and reducing corruption.

F. ORGANIZATIONAL ARRANGEMENTS WITHIN PROCURING ENTITIES

95. There is considerable room for progress to be made at the level of procuring entities. A characteristic that the Ukrainian procurement system shares with underdeveloped and underperforming procurement systems is that procurement activities are not widely performed by a cadre of professionals whose time is primarily dedicated to procurement activities. At present, procurement activities are typically carried out on an *ad hoc* basis by members of the Tender Committee established in each procuring entity pursuant to the Procurement Law, and by staff from the respective entity's logistics department. In most cases, none of those staff are dedicated exclusively or mostly to procurement functions. Procurement is merely an additional task assigned to them.

96. The solution that is usually recommended for the type of situation described above is the establishment of a procurement unit or department dedicated to conducting activities associated involved in the procurement process in an appropriate place within the procuring entity. In that way, the procurement function is attended to on a continuous basis rather than in a sporadic manner geared toward periodic meetings of the Tender Committee.

G. HUMAN RESOURCES AND CAPACITY BUILDING

97. Strategies for combating governmental corruption typically highlight the importance of developing professionalism in the state bureaucracy. Activities for boosting professionalism include training, certification, professional recognition of distinct types of functions and skill sets, career development paths, and satisfactory levels of remuneration. This is particularly important for the

[10] For example, see USAID, *Corruption Assessment: Ukraine. Final Report* (February 10, 2006).

procurement function and is emphasized by many national procurement reform and anti-corruption initiatives worldwide.

98. Some steps have been taken in the direction of building a trained workforce for public procurement, an indispensable criterion for assessing the effectiveness of a procurement system (see OECD Sub-indicator 5[c]). These steps include the beginnings of certification of some officials as trainers in public procurement. While introductory procurement training of Tender Committee members was previously optional, the most recent amendments to the Procurement Law aim to make such training mandatory under penalty of disqualification of officials who are not certified within a specified period of time. Certification of trainers is mentioned in the latest version of the Procurement Law as one of the functions of the Interdepartmental Commission, as is the certification of institutions for conducting officially sanction procurement training programs, the latter function formerly having been performed by the Ministry of Education and Science of Ukraine. However, any progress in capacity-building efforts is limited due to the short period of training involved and the monopoly that the ECA reportedly exercises in providing such training.

99. A broader range and a greater number of advanced opportunities for capacity building are essential for the development of the procurement system, including both the operational and the oversight levels. Such capacity building is indispensable for building a cadre of procurement professionals, an objective that should be deemed essential for the development and execution of public procurement on a proper footing.

H. MAIN RECOMMENDATIONS FOR THE INSTITUTIONAL FRAMEWORK

100. The main recommendations for the institutional framework are as follows:

(1) Re-establish and consolidate independent policy and oversight of functions of the procurement system as well as separate implementation and oversight functions, removing fragmentation of authority, institutional conflict of interest, and involvement of the legislative branch and the non-state sector in functions assigned to the executive branch (by creating an independent body reporting directly to the Cabinet of Ministers or the President, restoring the former DCSP in the Ministry of Economy and its functions, or assigning the full range of policy and oversight functions and the necessary resources to the Antimonopoly Committee);

(2) The functions of the Interdepartmental Commission should be limited to providing independent review of bidders' complaints and – possibly – debarment of suppliers, contractors, or consultants, and its composition should be modified to exclude participation by the Verkhovna Rada and Tender Chamber;

(3) If it is to be retained, convert the Tender Chamber into a truly non-governmental, civil-society organization that is not involved in any operational or administrative functions related to implementation of the procurement process (similarly, oversight responsibilities should not be assigned to commercial banks);

(4) Develop improved and automated systems for collection and analysis of statistical information on procurement activities;

(5) Develop and implement a strategy for raising the level of professionalism in the procurement function, including establishment of dedicated procurement units in procuring entities that are staffed by a cadre of procurement professionals with career advancement possibilities within the procurement function; and

(6) Provide the capacity-building programs needed on an ongoing and graduated basis for personnel implementing procurement proceedings as well as those conducting internal and external oversight in the sphere of procurement.

III. PROCEDURES AND PRACTICES

A. PROCUREMENT PLANNING

101. The Procurement Law (Article 2-2[2]) affirms that preparation and Internet publication of an annual procurement plan is the obligation of every procuring entity. Such planning is one of the essential steps for ensuring efficiency and a good level of competition in a procurement system (see OECD Sub-indicator 3[b]). This is in line with the WTO GPA (Article VII[4]), which calls for publication of a notice of planned procurement. Similar requirements are found in the EU Procurement Directive (Article 35) regarding supplies and services contracts and (to some extent) for works contracts. It has been observed that the annual planning exercises that take place and notices that are published need to become more detailed and precise, particularly in terms of the timing of the planned procurement. The EU Procurement Directive (Annex VIII), including the use of the Common Procurement Vocabulary (CPV, a classification nomenclature/code system), may be used as guidance in that regard. Obstacles that procuring entities face in planning (and furthermore, in implementing plans) include delays in distribution of budgeted funds in particular.

102. The Procurement Law (Article 2[6][4]) exempts enterprises from rules governing the annual procurement planning exercise. Such an across-the-board exclusion would not necessarily be in line with the aforementioned WTO GPA and EU provisions because there is no exemption of enterprises from the requirements in those instruments concerning publication of annual procurement plans.

103. The Procurement Law does not contain any provisions for calculating the estimated value of a procurement transaction. Application of proper practices when estimating the value of procurement is crucial from a number of standpoints that include the following: procurement planning and budgeting; correct application of thresholds established in the Procurement Law and its implementing regulations, including those for selection of the appropriate procurement method (and eventually determining which procurement transactions are subject to international obligations that may be undertaken by the Government of Ukraine such as the WTO GPA and the EU Procurement Directive for which application is defined by referring to thresholds); and assessing the rationality of prices submitted by bidders in procurement proceedings (including identification of abnormally low bid prices). When formulating provisions for estimating the value of procurement transactions (which might be addressed in detail in regulations), references may be made to relevant provisions in the WTO GPA (Article II[6]) and the EU Procurement Directive (Article 9).

B. PUBLICATION OF PROCUREMENT NOTICES AND OTHER INFORMATION

104. Publication of invitations to bid and other types of procurement information in print and electronic media receives considerable attention in the Procurement Law, and yet it remains an area of practice that merits further attention and streamlining. As presently configured and implemented, the provisions in the Procurement Law have led to an excessive degree of redundancy in publication requirements, potential scattering of both printed and electronic publication (resulting in uncertainty for bidders and other interested parties as to which sources need to be searched in order to obtain a comprehensive picture), excessive publication procedures for procuring entities, and – as already noted – gratuitous opportunities for well-positioned and connected companies to exploit the system for undue gain, thus artificially elevating costs and diminishing the level of economy and efficiency in the procurement system. In the end, such difficulties undermine the basic anti-corruption principle of access to information.

105. The main drawbacks of the existing provisions for electronic publication of procurement information is that they fail to provide for the creation of a single, official state Web site through which interested parties could access information on the procurement activities of all procuring entities (sometimes referred to in international practice as a "single-portal Web site"; the WTO GPA (Article VII[1]) encourages publication in this type of single-portal Web site; concerning

Internet publication, GPA Checklist Question 25 (procurement legislation), Question 26 (invitations to bid/pre-qualify), Question 28 (permanent lists of suppliers), and Question 29 (contract award notices) should also be taken into account.

106. In contrast, the Procurement Law seems to encourage each procuring entity to use any Internet service provider (ISP) it wishes as long as the ISP meets requirements established in the Procurement Law (these are listed in Article 4-2). It appears that the Tender Chamber (assigned the job of posting the list of ISPs that meet those requirements by the Procurement Law) has a considerable say in the ultimate approval of ISPs for publication purposes. Until now, there has been a monopoly in which only one ISP – allegedly with links to the Tender Chamber – has obtained the required certification.

107. The Procurement Law (Article 8) also requires printed publication of invitations to bid and to pre-qualify. The requirement refers to publication in two specialized bulletins, including the bulletin published by the Tender Chamber. This is in addition to the required Internet publication. Again, the Tender Chamber publishes the list of approved publication providers. No rule is provided for which publication is deemed the publication of record (for example, for calculating the time period for preparation and submission of bids). The Tender Chamber has ruled that publication in its bulletin is the authoritative publication.

108. Procuring entities have complained of the excessively long time that it routinely takes for the notice of a procurement proceeding (i.e., an invitation to bid) to be published, with the delay following submission of the notice for publication being as much a month before publication finally does take place, though it was reported that recently there has been some improvement.

109. In addition, charges imposed on procuring entities for Internet publication of notices have placed a burden on procuring entities for which they do not have budget funds allocated, thus contributing to delays in conducting procurement proceedings. The excessively high cost of publication of notices (500 UAH) is a burden in particular for budget-strapped municipal governments. Moreover, as alluded to above, it has been reported that the ECA (which happens to own the Internet Web site on which procurement notices must to be published) routinely refuses to publish a notice unless the procuring entity agrees to allow the ECA to provide it with consultative services. It was further reported that a fee of 1 percent of the value of the procurement proceeding has been imposed for ECA services in these cases, and that no services were provided because bidding documents were actually prepared by the procuring entities themselves.

110. This burden can be eased – and opportunities for abuse can be eliminated – by establishing an official single-portal Web site and an official printed procurement bulletin in which procuring entities may publish their notices free of charge.

111. It should be noted that publication requirements in the WTO GPA and the EU Procurement Directive regarding the restricted bidding method extend beyond those found in the Procurement Law. That is due in particular to the fact that the WTO GPA and the EU Procurement Directive do not establish a hierarchy between open and restricted bidding methods. Moreover, those instruments establish an expression-of-interest type of procedure in the case of restricted bidding (e.g., EU Procurement Directive Article 44[3]). No such procedure is envisaged in the Procurement Law.

C. BIDDER QUALIFICATION REQUIREMENTS

112. The qualification criteria and assessment systems are of interest to both domestic and foreign bidders alike and are the subject of important provisions in the WTO GPA (Article VIII; see also GPA Checklist Questions 17, 18) and the EU Procurement Directive (Articles 45-52).

113. Positive aspects of the provisions in the Procurement Law include the list of permissible qualification requirements (Article 15[1]), and required predisclosure of qualification requirements to bidders (Article 15[2]), as well as the affirmation of the principle of non-discrimination (Article 15[3]). The qualification provisions could be strengthened by including a statement such as that found in the UNCITRAL Model Law (Article 6[1]) to the effect that the procurement contract will

only be awarded to a bidder possessing the qualifications needed to perform the contract. Another good model to emulate is the statement in the WTO GPA (Article VIII[1]) that the qualification requirements should be limited to what is required in order to perform the procurement contract in question.

114. One potentially problematic issue is the possibility that an interpretation of the Procurement Law could be made to the effect that that the qualifications of bidders may be assessed on a comparative basis rather than on a pass/fail basis. Such a possibility is suggested by the latest revisions to Article 26(7) according to which the criteria to be utilized for evaluation of bids are to include the "rating" given to a bidder in the register of participants in procurement proceedings. That register is to be established by the Interdepartmental Commission pursuant to the new Article 16-1of the Procurement Law.

D. REGISTER AND CATALOG OF PARTICIPANTS

115. The register mentioned at the end of the preceding paragraph as well as the catalog of participants in procurement proceedings to be maintained by the Tender Chamber pursuant to the latest amendments to the Procurement Law (Article 17-3[10]) are of interest from the perspectives of both the EU and the WTO GPA. Inscriptions in the register and the catalog are each subject to an application by the bidder concerned. Inscription in the catalog is a prerequisite for participation in procurement proceedings. It is not readily apparent why it is necessary to have two parallel procedures of very similar types such as these.

116. Application of mechanisms such as the register and catalog is of particular relevance to arrangements such as the WTO GPA (Article IX) and the EU Procurement Directive (Article 52) in light of the risk that such systems may unduly limit competition and present barriers to entry into a procurement market (see OECD Sub-indicator 1[d]). In order to mitigate that risk, those instruments establish a number of procedural requirements that ensure transparency and accessibility of the registration or listing process (see the provisions in the WTO GPA Article IX[7] to [14] concerning "multi-use lists" that provide, for example, regular publicity concerning the existence of the list, continuous availability for application and inscription, prompt disposition of applications and inscriptions, and the possibility in most cases for non-listed bidders to participate in relevant procurement proceedings provided that they submit the required qualification information).

117. The provisions in the Procurement Law for the register and catalog do not include the full range of such procedural safeguards. Moreover, the maintenance of the catalog represents another important exercise of power by the Tender Chamber that lies at the heart of the executive governmental function in the procurement process.

118. The catalog procedure (i.e., the requirement that in order to be eligible to participate in procurement proceedings, bidders must be inscribed in the "catalog of participants" maintained by the Tender Chamber) is reported to have a burdensome and deterrent effect on the level of participation and competition in procurement proceedings, especially in the case of small businesses. A 5,000 UAH fee is charged for inscription, along with the additional fees of 1,500 UAH imposed for a subscription to the catalog and 500 UAH for a certificate proving inscription in the catalog. The cumulative effect of these fees is prohibitive for many small businesses. The burden of the procedure is compounded by the fact that the term of inscription is only one year.

119. Pursuant to Article 17-3(12), decisions of the Tender Chamber concerning (for example) denial of an applicant's inscription in the catalog can be appealed before the Interdepartmental Commission. Yet here again there is an example of the inbred, circular character of the institutional oversight arrangements and their built-in conflicts of interest: entities represented in the Interdepartmental Commission also sit on the Supervisory Council of the Tender Chamber, and the Tender Chamber itself has three representatives in the Interdepartmental Commission!

120. The Procurement Law (Article 17-3[10], third subparagraph) requires publication of the catalog in printed and electronic form. This is in line with the requirement in the WTO GPA Article IX(1).

However, there does not seem to be any explicit reference to required publication of information about the application procedure.

121. It should be noted that in the present process of revising the UNCITRAL Model Law, UNCITRAL is preparing provisions on lists of bidders, an issue that was omitted from the original version of the Model Law.

122. Preferential provisions in favor of domestic bidders that formerly appeared in the Procurement Law (formerly Article 6), have been removed in the latest round of amendments (see GPA Checklist Questions 11-15). In order to assess the practical impact of that modification, the possibility that any regulations or other legislative or sub-legislative text restriction might be applied pursuant to the Procurement Law (Article 15[1], first paragraph, referring to licensing requirements) will also have to be ascertained. For example, there is a practice in health sector procurement of only accepting bids from Ukrainian resellers or Ukrainian producers of pharmaceuticals.

E. PROCUREMENT METHODS

123. It appears that some progress has been made in terms of the extent to which competitive methods of procurement (in particular open bidding) are utilized, though use of sole-source contracting still needs to be reduced. The types of procurement methods provided for by the Procurement Law represent another area that requires more attention (including some remedial measures), particularly following the latest round of revisions to the Law. The revisions to the provisions on procurement methods have not only been formulated in an unclear and confusing manner, but they have also diminished transparency and opened the door for corrupt and collusive practices.

124. Following those revisions, the open bidding method has added a "price reduction" (Article 13) that provides the successful bidder with an opportunity to lower the price (though a refusal to do so is not supposed to alter the outcome of the proceedings). From the standpoint of international best practices, such a procedure is undesirable because it will likely cause bidders to elevate their initial bid prices in anticipation of being asked to give subsequent discounts. Moreover, the procedure in effect is an opportunity for something akin to negotiations to take place – in violation of the principle that bidding proceedings should not involve negotiations to modify the price or substance of bids (see Article 26[5] of the Procurement Law). Thus, the provision may be seen as not in line with such instruments as the UNCITRAL Model Law (Article 35) and the EU Procurement Directive (Articles 28, 30, and 31) which restrict negotiations to certain limited types of cases. A somewhat looser standard is applied to negotiation under the WTO GPA (Article XII).

125. The Procurement Law also provides for a reverse auction procedure that can be added to a bidding procedure (additional to the aforementioned price reduction phase at the end of a bidding exercise). Furthermore, the reverse auction method seems also to be presented as a stand-alone method. However, as noted above, the manner in which all of this is formulated may be unclear and confusing to many readers and users of the Procurement Law.

126. The auction procedure introduced into the Procurement Law is not in line with emerging international standards regarding the use of reverse auctions in public procurement. The primary expression of those standards is found in the EU Procurement Directive, which does recognize and regulate the use of reverse auctions – but only the "electronic reverse auction" (ERA) variant. The reverse auction procedure in the Procurement Law is not compliant with the EU Directive, particularly because it does not have the anonymous character that is an inherent feature of the EU ERA and the ERA recognized by the WTO GPA. By contrast, the reverse auction procedures provided by the Procurement Law are not electronic and not anonymous because the competing bidders are gathered face-to-face, thus facilitating collusion and other abuses. Yet, the Procurement Law (Article 14[1]) states expressly that procurement methods involving such non-anonymous reverse auctions are to be the "main procedures" (the Ukrainian text of the amendments does not seem actually to contain an amendment of the previous text in the provision concerned to this effect).

127. Restricted bidding is not provided in the Procurement Law on grounds of economy and efficiency (i.e., when the estimated value of the procurement does not warrant the time and resources to have many bids prepared or to examine them). This is not in line with the UNCITRAL Model Law, and it deprives procuring entities of an important competitive tool for dealing with lower-value procurement.

128. It should also be noted that the WTO GPA as well as the EU Procurement Directive require publication of an announcement even in the case of restricted bidding (including the criteria to be used for limiting the number of participants if not all respondents are admitted to the proceeding). This approach – which might allow the use of the shortlisting technique for procurement of consultative services – is not provided for by the Procurement Law.

129. Another aspect of the provisions on procurement methods that needs to be addressed is the continued lack of a procurement method specifically tailored to procurement of consultative services. Such a special method is foreseen by the UNCITRAL Model Law and, to some extent, the EU Procurement Directive and the WTO GPA (for example, because of free access to restricted bidding in both of those instruments, thus allowing a short-listing procedure). Without such a special method for procurement of consultative services, procuring entities are left to use procurement methods that are not suited to take the particular considerations relevant to selection of consultants into account. In particular, methods such as open or restricted bidding (now with the dubious price reduction procedure) in which price is the dominant or exclusive evaluation criterion will be used. By contrast, according to best practices, price should normally have a diminished weight in evaluation and ranking of proposals for consultative services; in some exceptional (but not rare) cases, it is not even a factor in the ranking of proposals.

130. It is noted that in line with international standards, the Procurement Law (Article 14[3]) does affirm the rule against artificial splitting of procurement requirements in order to avoid the use of more stringent and competitive procurement methods (see OECD Sub-indicator 19; EU Procurement Directive Article 9[3]; and WTO GPA Article II[6][a]).

131. The Procurement Law (Article 2[6][2]) sets a higher monetary value limit for use of the request for quotations method by enterprises than it does for other types of procuring entities subject to the Law. That is not an issue that necessarily implicates the WTO GPA in EU compliance issues, to the extent that those levels of procurement are likely to remain under the thresholds for application of obligations related thereto. It may also be noted that the EU Procurement Directive (Utilities; Article 40) also applies a more flexible approach to the choice of procurement methods than the EU Procurement Directive does.

F. BIDDING DOCUMENTS

132. The Procurement Law (Article 21) contains a fairly comprehensive listing of the required contents of bidding documents to be used in open and restricted bidding proceedings (see OECD Sub-indicator 1[e] and the UNCITRAL Model Law Article 27). However, as noted elsewhere in this report, the practice of bidding documents has been hampered by the failure of the system to issue standard bidding documents effectively thus far.

133. Another gap is the lack of a rule in the Procurement Law concerning the amount of the fee that may be charged for bidding documents (or for pre-qualification documents). While reference is made to the charging of a fee (Article 18-1[4], 20[1]), it should be stated that the fee may reflect only the cost of printing and distribution of the documents. By contrast, the Procurement Law (Article 20[4]) refers to covering the costs of preparation of the bidding documents, a formulation likely to encourage the wrong practice of using sales of bidding documents for generation of revenue. Indeed, it is reported that bidders have been complaining about exorbitant fees charged for bidding documents, a practice that undoubtedly depresses participation – especially by small local businesses.

G. TECHNICAL DESCRIPTIONS AND SPECIFICATIONS

134. From the standpoint of measuring compliance of the Procurement Law with international standards, the provisions on formulation of technical descriptions and specifications are of paramount importance (see GPA Checklist Question 23). This also happens to be an area of practice that has received complaints from bidders about inadequacy and lack of clarity of such descriptions.

135. The Procurement Law (Articles 18-1[5 and 6], and 21[2 and 3]) contains provisions on the formulation of technical specifications and descriptions of the object of procurement. In addition to being unnecessarily repetitive, those provisions need to be reviewed with the aim of ensuring that they reflect the basic principles enshrined in international standards in a more satisfactory manner, including the UNCITRAL Model Law, EU Procurement Directive, and WTO GPA.

136. For example, greater emphasis should be given to formulating technical descriptions and specifications in terms of required performance than in terms of detailed design. The existing text seems to give more emphasis to the latter than is needed, thus perhaps inadvertently encouraging practices that may create barriers to entry and reduce competition; Article 18-1(5) might be read as giving priority to detailed design types of formulations, with performance characteristics being used only as a fall-back position – this is somewhat the opposite of the approach used, for example, in the WTO GPA (Article X[2][b]). Such an approach tends to promote over-specification, which limits rather than enhances competition.

137. It would also be preferable to place the provisions on technical descriptions in a stand-alone article rather than repeating them twice. It should also be noted that closer alignment with the EU might be enhanced by utilization of the EU nomenclature (i.e., the Common Procurement Vocabulary, or CPV) for formulation of technical descriptions where applicable.

H. TIME PERIODS FOR SUBMISSION OF BIDS

138. The minimum time periods set in the Procurement Law for submission of bids are on the short side in some cases (e.g., ten days in the case of pre-qualification; see Article 18-1[9]). It should be noted that for purposes of eventual compliance with time limits in the EU Procurement Directive if Ukraine's procurement should actually become subject to the Directive (the basic rule is 52 days following the dispatch of the notice for publication), this will have to be taken into account when preparing bidding documents because the Procurement Law provides a basic minimum period of 30 days.

139. The EU Procurement Directive differentiates between the minimum time period for open bidding (52 days) and a shorter minimum period for restricted bidding, in which case it specifies a minimum period for filing of expressions of interest (37 days) and then sets a minimum period (40 days) for receipt of tenders. The Procurement Law does not impose any publication requirement with respect to restricted bidding and does not contain provisions on the procedure for solicitation and filing of expressions of interest. In fact, the distinction between the pre-qualification and short-listing procedures is blurred by linking the holding of pre-qualification proceedings to the notion of restricted bidding. Pre-qualification and short-listing should be treated as two different procedures (according to international standards, the pre-qualification proceedings should admit every bidder that applies and meets the pre-qualification criteria on a pass/fail basis, without numerical limitation; under short-listing, the procuring entity may select a limited number of the comparatively best applicants in their order of ranking).

140. The Procurement Law (19[3]) allows the minimum time periods to be shortened but does not provide any reasons or factors that need to be cited for such a reduction. By contrast, the EU Procurement Directive (which permits shortening of the minimum periods in certain cases) links any such shortening of the normal time periods to the publication of prior notices that have given sufficient advance information concerning the upcoming procurement to the electronic transmission of notices for publication or to the availability of the bidding documents via electronic downloading or in cases of urgency (see Article 38[4-8] of the Directive).

141. The WTO GPA (Article XI) provisions on time periods are generally similar to those in the EU Procurement Directive, although the actual time periods are somewhat different. Again, however, it should be noted that in order to comply with the WTO GPA limits where applicable should Ukraine eventually accede, the WTO GPA limits would have to replace those in the Procurement Law in cases of procurement subject to the WTO GPA. The question of time periods is included in the GPA Checklist (Question 21).

142. It is also noteworthy that the latest revision of the WTO GPA (Article XI[7]) provides for a shortened period when "commercial goods or services" are procured if electronic publication of the notice and downloading of bidding documents are applied.

I. BID SECURITY REQUIREMENTS

143. The provisions in the Procurement Law on bid security requirements need to be reviewed from a number of standpoints. First, the latest round of amendments to the Procurement Law have added a new second paragraph to Article 23(1) that makes the imposition of a bid security requirement mandatory in all procurements with a value that exceeds the thresholds set in the provisions. It is not advisable to use the relatively inflexible instrument of a statute to set such thresholds, which are likely to need to be re-evaluated and re-set relatively frequently.

144. Second, the new mandatory approach rather than the permissible approach to imposition of bid security requirements might not be the wisest method because such a requirement hits domestic small businesses the hardest and tends to depress their participation in procurement proceedings. The Procurement Law should instead strive to encourage and facilitate their participation with the goal of increased competition in public procurement and the economic development of the country. At the very least, a mention should be made of the possibility that when a bid security requirement is imposed, the procuring entity may choose instead to opt for an alternative form of security (e.g., the "bid-securing declaration" that has been introduced in the latest editions of the World Bank Standard Bidding Documents). The bid-securing declaration enables bidders merely to sign a declaration accepting to be automatically debarred for a specified period of time if they violate their commitments as bidders rather than submitting a cash deposit or a bank guarantee (both of which are very costly and possibly prohibitive for small businesses).

145. Third, Article 23 is worded in a less than clear manner as to the nature and acceptable form of the bid security. Clarity in this regard is of utmost importance – a necessity that is underscored by the complaints emanating from bidders (and even some procuring entities) as to anomalies and abusive practices that have reportedly crept into the practice of bid securities in Ukraine, which has resulted in manipulation and a degree of attempted monopolization of bid security issuance and diminution of the actual protection afforded to procuring entities by bid securities.

J. OPENING BIDS

146. The provisions in the Procurement Law for opening of bids (Article 26) could be elaborated in order to bring them closer to being fully in line with international standards (see OECD Sub-indicator 1[g]). The rule on the timing of the bid-opening ceremony (Article 26[1]) should be tightened to reflect the best practice that bid opening should coincide with or occur immediately following the expiry of the deadlines for submission of bids (with possibly only a short interval of an hour or two allowed for logistical reasons if necessary; see UNCITRAL Model Law Article 33[1]).

147. The provision in the Procurement Law (Article 26[3], third subparagraph) on the information to be read aloud at the bid opening ceremony is incomplete. In particular, no mention is made of opening and reading modifications and withdrawals of bids, alternative bids (if those have been solicited or permitted), or information about fulfillment of bid security requirements if applicable. A requirement that at least all the members of the bid opening committee should sign the minutes of the bid opening ceremony is also missing.

148. The provisions for bid opening (Article 26[3]) establish a "price reduction with reduction of price" procedure that may be carried out in conjunction with the open bidding method. As already noted,

the expression "open bidding with price reductions with reduction of price" is inherently unclear and confusing. To the extent that the expression and the procedure are understood, they appear to be fundamentally inconsistent with international standards. Not only is this likely to push bidders to artificially elevate their initial bid prices, it may at the same time increase the risk of an award being made on the basis of an abnormally low-bid price along with the attendant risk of difficulties and abusive practices in contract implementation. The procedure also seems to facilitate collusion among bidders at the bid opening ceremony.

K. EVALUATION OF BIDS

149. While various essential provisions on evaluation of bids are included in the relevant provisions in the Procurement Law (Article 26[4-10]), some further developments and amendments are required in order to bring them up to international standards as expressed in the UNCITRAL Model Law, the WTO GPA (Article XV; see also GPA Checklist Question 22), and the EU Procurement Directive (Article 53).

150. The formulation of the types of permissive evaluation criteria (Article 26[7]) could be made more precise; for example, to describe criteria for life-cycle-cost types of evaluation (see the formulation in the EU Procurement Directive Article 53[1][a]).

151. It has been observed that the general tendency in practice is to give an inordinate if not exclusive weight to price in evaluation of bids even when other non-price factors should be given due weight. Article 26(8), which requires that price should be given at least 70 percent weight in bid evaluation, probably encourages such a practice and should be reconsidered. In fact, there is no need to set such practical details in the Procurement Law; it is better to leave them to the regulations or even to practice manuals.

152. At the same time, the selection of the lowest-priced bid does not seem to guarantee that the procuring entity is not paying more than it should. It is reported that because of generally elevated bid prices, bid evaluation (which may result from collusive practices) results in procuring entities paying above-market prices. Perhaps providing reference market prices for procuring entities might lower the incidence of such outcomes and practices.

153. The tendency to invariably award contracts to bids with the lowest sticker price is also a symptom of inadequate implementation of Article 26(8), which refers somewhat obliquely to the quantification of non-price factors in monetary terms (a technique in which bid evaluation and comparison are aimed at on identifying the true, overall cost to the procuring entity of each bid that it evaluates; see the UNCITRAL Model Law Article 34[4][ii], which requires non-price criteria to be quantified in monetary terms when feasible). Article 26(8) also mentions the alternative approach of assigning a relative weighting to the evaluation criteria, an approach referred to in the EU Procurement Directive (Article 53[2]). It would no doubt help if those techniques were to be elaborated and explained in implementing regulations and practice manuals. At this point, some bidders are complaining that bid evaluation is being conducted on the basis of merit points, which are subjective and less than predictable.

154. Unlike the EU Procurement Directive (Article 55) and the WTO GPA (Article XV[6]), the Procurement Law does not contain a rule for dealing with abnormally low-priced bids. The implications of that gap are made more significant by the addition of "price-reduction" procedures. The revisions to the UNCITRAL Model Law that are currently being prepared are expected to include a provision on such cases.

L. CANCELLATION OF PROCUREMENT PROCEEDINGS

155. The provisions in the Procurement Law on cancellation of procurement proceedings (e.g., Article 28) are formulated in a rather open-ended manner that invites resorting to cancellation excessively, which should be an exception rather than a routine measure. The most egregious example of open-endedness is the provision referring simply to cancellation in "other cases as decided by the customer" (Article 28[2], fourth subparagraph). Such provisions may run counter

to the basic anti-corruption principle of avoiding granting excessive discretion to state officials on the grounds that it may give rise to rent-seeking behavior.

156. Another questionable provision is the mandatory cancellation of procurement proceedings when less than three bids are received, an approach that is not in line with international best practices (no such rule is found in the UNCITRAL Model Law, the EU Procurement Directive, or the WTO GPA). Given the low average rate of participation in procurement proceedings, such a rule can only exacerbate inefficiency and lack of confidence in the procurement system. Indeed, there have been complaints about persisting chronic cancellation of procurement proceedings, which in turn may further depress participation.

157. In addition to the manner in which Article 28 is formulated, numerous other provisions in the Procurement Law either authorize or mandate the cancellation of the procurement proceedings in various other types of potential scenarios (e.g., see Article 34[3]). Moreover, a number of the instances of discretionary cancellation of procurement proceedings lend themselves to being manipulated or abused by unscrupulous procuring entities and may promote inefficient (if not corrupt) practices. This in turn will invariably further undermine the efficiency of and confidence in the procurement system.

M. CONTRACT ADMINISTRATION

158. Failure to issue the GCC and regulations thus far invariably impacts the quality and uniformity of contract administration practices, because it is in the GCC and the regulations of a procurement system that the uniform standard and detailed procedures can be set for various steps in the contract administration process (e.g., acceptance of contract performance and quality control; see OECD Sub-indicator 8[a]).

159. Delays in payment are another source of chronic complaints regarding the procurement system.

N. ELECTRONIC PROCUREMENT

160. The Procurement Law contains a smattering of provisions that touch on introduction of modern information and communications technology to the procurement process. Together, they do not provide an adequate treatment of electronic procurement or set a proper basis for its introduction and implementation, and further development is therefore needed.

161. From the standpoint of strengthening the fight against corruption in state procurement, the existing provisions fail to provide a solid foundation for introduction and growth of electronic procurement, thus hindering the use of techniques that may promote transparency and access to information and help reduce corruption. The ways in which existing provisions and practices limit the anti-corruption activities, efficiency, and other potential benefits of information and communications technology are poignantly illustrated by the current situation surrounding internet publication of procurement information.

162. The definition in the Procurement Law of the term "electronic state procurement" (Article 1) is problematic. It is predicated on the use of the "electronic digital signature." That definition violates the core principle of technological neutrality, i.e., that legislation in the e-commerce field should not elevate any particular technological forms or mechanisms and should instead leave room for technological development and choices to the greatest extent possible. By basing the definition of electronic procurement on the use of digital signatures, the Procurement Law closes the door on developments in practice (in a field that is rapidly developing) and excludes the use of other simpler and much cheaper forms of security to the extent and in the particular contexts that security measures may be necessary. For similar reasons, Article 9(3) is problematic.

163. The definition is also of a rather undifferentiated nature that might not adequately reflect a broader understanding of electronic procurement as encompassing a wide range of possible applications of information and communications technology in the procurement process. Such an understanding is an important basis for phased introduction of various components, mechanisms, and procedures within the broad notion of electronic procurement.

164. Indeed, it may not actually be advisable to define the term "electronic procurement." An alternative (and more open and flexible) approach may be to define a term such as "electronic means" and refer in the Law to the use of electronic means for implementing various procedures. Such an approach is used in the EU Procurement Directive (see the Directive's Article 1[13] for a definition of the term "electronic means"). In addition, it may be helpful to introduce – either in the Procurement Law or its implementing regulations – the notion of standards that must be met, for example, for electronic submission of bids (see OECD Sub-indicator 1[g]; a possible model for some of these provisions may be found in the EU Procurement Directive, Annex X [requirements for the electronic receipt of tenders, requests to participate, and plans and projects in design contests]; other provisions in the EU Procurement Directive as to which reference can be made in the further revision of the Procurement Law regarding electronic procurement include those on rules applicable to communications [Article 42] and electronic reverse auctions [Article 54]).

165. One of the first steps that may be taken in implementing electronic procurement is the establishment of a single-portal Web site for public procurement in the country as previously discussed in this report. It is a relatively low-cost measure, can be completed quickly, and can help set the stage and momentum for further steps in a phased introduction of electronic procurement. As discussed elsewhere in this report, the provisions in the Procurement Law run counter to such an approach because they encourage the use of multiple Web sites (See Annex B for an illustrative framework of possible features of a single-portal Web site).

166. Along the lines of the comments above, the references in Article 4-1(2) and Article 4-2 to electronic procurement (as well as the statement in Article 4-1[6]) reflect a truncated – rather than a broad and differentiated – understanding of electronic procurement. They may thereby confuse rather than clarify the strategic and practical issues raised by implementation of electronic procurement. In other words, just because a particular service provider is engaged for publication of notices, this should not necessarily mean that that same service provider must (by statutory disposition) also be capable of providing the full panoply of services encompassed by the broad notion of electronic procurement (e.g., electronic reverse auctions, "electronic marketplaces," etc).

O. MAIN RECOMMENDATIONS ON PROCEDURES AND PRACTICES

167. The main recommendations for procedures and practices are as follows:

(1) Establish an official "single-portal" government Web site for Internet publication of information required by the Procurement Law to be published on the Internet, on which publication of information – including invitations to bid or to apply for pre-qualification – will be mandatory in addition to other functions that such a Web site may perform;

(2) Provide capacity building and improved procedures for procurement budgeting and planning;

(3) Consolidate the register of participants in procurement proceedings and the catalog of participants into one facility operated by a government entity, and elaborate procedures in line with the EU Directives and the WTO GPA to ensure that the procedure does not restrict competition or create barriers to entry;

(4) Eliminate the "price reduction" phase that has been added to the open bidding method;

(5) Eliminate the "reduction of price" (reverse auction) procedure or convert it into a purely electronic reverse auction in line with the EU Procurement Directive and the WTO GPA;

(6) Add a procurement method designed specifically for procurement of consultative services in line with the UNCITRAL Model Law;

(7) Develop and implement methodology for technical descriptions and specifications that enhance rather than unnecessarily restricting competition, enable bidders to submit bids responsive to the needs of the procuring entity, and provide for usage of international nomenclature (e.g., the EU CPV);

(8) Increase the general minimum time periods for submission of bids in bidding proceedings;

(9) Review requirements as to bid securities so as to limit unnecessary burdens on small businesses, avoid manipulation and distortion of such requirements in practice, and introduce alternatives such as bid-securing declarations;

(10) Develop and implement more sophisticated and accurate methods of evaluation and comparison of bids;

(11) Limit the permissible cases and tighten the procedures for cancellation of procurement proceedings; and

(12) Develop and implement an integrated strategy for implementation of electronic procurement with the appropriate authorization and basic standards provided in the Procurement Law, in line with international standards such as those in the EU Procurement Directives and the revisions to the UNCITRAL Model Law, and in coordination with e-Government and "electronic Ukraine" initiatives.

IV. ACCOUNTABILITY, TRANSPARENCY, AND ANTI-CORRUPTION MEASURES

A. PROVISIONS FOR STANDARDS OF CONDUCT AND ENFORCEMENT

168. Key steps that need to be included in an anti-corruption strategy include issuance of clear codes of conduct that address conflicts of interest, performance standards, and accountability and effective enforcement. Those principles apply in particular to combating corruption in the procurement function.

169. The Procurement Law has a number of provisions pertaining to standards of conduct for participants in the procurement process. These include the following:

(a) The right of the Interdepartmental Commission to refer suspected felonious conduct to enforcement authorities (Article 3-1[6], second subparagraph; but why is such a referral discretionary?);

(b) The obligation of the procuring entity to reject a bid tainted by offers of an improper inducement (Article 7[2], patterned after UNCITRAL Model Law Article 15; or if the bidder or one of its officials has been convicted of a business crime, Article 7[3]);

(c) Rejection of a bidder for presentation of false qualification information (Article 26[9]);

(d) Rejection of multiple bids submitted by affiliated bidders (Article 7[4]);

(e) Notice to the concerned bidder in case of (b) or (c), and recording in the report of the procurement proceedings (Article 7[5]);

(f) The possibility of expulsion and banning by the Interdepartmental Commission of Tender Committee members for violations resulting in cancellation of procurement proceedings or invalidation of contracts; Internet posting of such information (Article 12[7], fourth and fifth subparagraphs);

(g) Establishment of a register of unscrupulous bidders (blacklist) and posting it on the Internet (Article 16);

(h) The right of the Tender Chamber to report suspected felonious conduct to law enforcement authorities (Article 17-3[8], second subparagraph); and

(i) The confidentiality rule restricting disclosure of information concerning evaluation of bids (Article 26-1, though a wider-ranging confidentiality rule in the Procurement Law would be useful).

170. At the same time, the Procurement Law seems to lack a coherent statement of a code of conduct for the participants in the procurement process (this applies to the public and private sectors' sides of the table). As a result there are fundamental gaps that include, for example, a lack of provisions on conflict-of-interest rules (e.g., concerning officials acting on behalf of procuring entities or otherwise involved in the procurement process, and non-eligibility of consultants for particular assignments that conflict with their other assignments), and a lack of procurement-specific definitions of terms such as "corrupt practices," "fraudulent practices," "collusive practices," and "coercive practices" (see OECD Sub-indicator 12[f]).

171. Against this backdrop of a legal framework for public procurement lacking adequate anti-corruption and conflict of interest provisions combined with an institutional framework with built-in conflicts of interest and opportunities for corruption, it is hardly surprising that the procurement system is increasingly subject to allegations of conflict of interest and corruption.

172. The provisions in the Procurement Law for exclusion of bidders tainted by convictions for business crimes are positive features (see OECD Sub-indicator 1[d]). Along the same lines, additional alignment with EU rules may be obtained by incorporating the formulations found in the EU Procurement Directive (Article 45[1]0) on disqualification of bidders associated with organized crime and other offenses in the corruption/fraud sector into the legal framework.

173. Enforcement of procurement rules is weakened by the relatively weak administrative sanctions for violations. Penalties imposed on individual officials under the *Administrative Code* are light even after recent increases, especially when compared to the amounts that may be gained illegitimately (penalties against a procuring entity are applied by way of a deduction from the next budget to reflect the loss incurred by the state).

174. Another escape route for violators is the fact that under the *Administrative Code*, a penalty may be imposed only during a two-month period following the violation. That is not an appropriate period for the context of procurement. A solution would be to make sanctions part of the *Criminal Code of Ukraine* wherein such a short limitation does not apply and/or to calculate the period under the *Administrative Code* from the point of discovery of the violation.

175. The implications of the lack of a comprehensive approach to conduct and conflict-of-interest issues in the Procurement Law are compounded by weaknesses and major gaps in the overall legislative and enforcement framework for combating corruption (e.g., the lack of a comprehensive anti-corruption law). Moreover, it bears repeating that the interlocking and inbred complex of oversight mechanisms that has been established by the Procurement Law (characterized by a breach of separation of the legislative and executive branches of government and the systematic intrusion of non-state sector interests into management of the public procurement process) seems more likely to create opportunities for corruption than to control it effectively.

176. One of the essential features of effective mechanisms for controlling fraudulent, corrupt, or unethical behavior in public procurement is the availability of secure mechanisms for reporting such behavior (see OECD Sub-indicator 12[f]). This does not yet seem to be established. For example, journalists reporting on abuses, conflicts of interest, and corrupt practices report receiving threats.

177. As pointed out elsewhere in this report, the particular manner in which reverse auction procedures have been added to the Procurement Law may create opportunities for corrupt practices, including collusion among bidders.

B. CONFIDENTIALITY

178. The Procurement Law (Article 26-1) requires confidential treatment of information concerning the evaluation and comparison of bids. That confidentiality provision could be elaborated and broadened along the lines of confidentiality provisions in the EU Procurement Directive (Article 6)

and the WTO GPA (Article XVII[2 and 3]). For example, the latter provision prohibits the procuring entity from providing "information to a particular supplier that might prejudice fair competition between suppliers" (a practice that has been alleged to take place in Ukraine).

C. INFORMATION ABOUT THE RESULTS OF PROCUREMENT PROCEEDINGS

179. In line with the UNCITRAL Model Law (Article 14), the EU Procurement Directive (Articles 35[4] and 36), and the WTO GPA (Article XVI[2]; GPA Checklist Question 29), the Procurement Law requires publication of a notice of awarding a contract (Article 17). The list of information to be included in the notice could be expanded to be closer to full compliance with the WTO GPA (see GPA Checklist Question 30).

180. Another important source of information on the results of procurement proceedings is the report that procuring entities are required to prepare pursuant to Article 17 of the Procurement Law, which is patterned on the UNCITRAL Model Law (Article 11). Preparation of such a report also serves as fulfillment of the requirement in the EU Procurement Directive (Article 43) to prepare a report on each procurement proceeding subject to the Directive, and would facilitate compliance with the information-sharing obligations under the WTO GPA (Article XVII[1]).

D. ARCHIVING DOCUMENTATION

181. The Procurement Law (Article 17[3]) requires archiving of procurement documentation for a period of three years. The corresponding provision in the WTO GPA (Article XVII[3]) refers to archiving for "at least" three years. At any rate, it should be ensured that the period provided in the Procurement Law is aligned with the statute of limitations concerning disputes that might arise regarding the contract award procedure or perhaps even the implementation of the procurement contract, as well as the limitation period for prosecution of fraud and corruption (see OECD Sub-indicator 6[c]).

182. No provision is made in the Procurement Law for a right of losing bidders to obtain a "debriefing" (i.e., a simplified procedure whereby a bidder may obtain an explanation of the reasons its qualifications or bids were rejected). Such a right is provided by the EU Procurement Directive (Article 41[2]) and the WTO GPA (Article XVI[1]; GPA Checklist Question 31). The availability of such a mechanism is important for transparency and can help reduce the use of the more costly and time-consuming bid protest procedure as a means for unsuccessful bidders to obtain information on why they were unsuccessful.

E. COMPLAINT PROCEDURES

183. It is self-evident that one of the important tools for combating corruption is to provide effective means of reporting misconduct. In the procurement context, the procedure for reviewing bidders' complaints can serve such a purpose.

184. The Procurement Law affirms the right of bidders to obtain a review of complaints regarding alleged infringements by the procuring entity (Article 36). A two-track approach is provided with a possible administrative review before the Interdepartmental Commission (Article 37), and the other being judicial (Article 37-1). The Procurement Law does not seem to require exhaustion of administrative remedies as a prerequisite for judicial review (though there is the possibility of judicial review of the administrative disposition of a complaint submitted to the Interdepartmental Commission; see Article 37[7]).

185. The choice of a procurement method by the procuring entity is exempt from review (Article 36[2]) in line with the existing provision in the UNCITRAL Model Law. However, this exclusion will likely be removed from the Model Law's provisions on review procedures. UNCITRAL is reconsidering its earlier position since it has become clear that in practice, violations of the applicable rules on choice of procurement methods are particularly harmful to achieving the basic objectives of a procurement system and should therefore be subject to the policing mechanism afforded by the review procedure. No such exclusion is envisaged by the EU (see Directive 89/665/EEC of 21 December 1989, hereinafter referred to as the "EU Remedies Directive") or in the WTO GPA provisions on review of complaints.

186. The Procurement Law (Article 36[2], third subparagraph) also excludes "any expenses incurred by the bidder in the process of the procurement procedure and conclusion of the procurement contract" from the ambit of review. While on the surface that statement appears to be in line with the principle that bidders are responsible for the cost of their participation in procurement proceedings, it might be interpreted as precluding the award to a successful complainant of damages in the amount of the bidder's cost of preparing and submitting a bid. Such a measure (and limitation) of damages is foreseen in the WTO GPA (Article XVIII[7][b]).

187. That and other aspects of the administrative review procedure could be more useful if elaborated, because the degree of procedural detail in the Procurement Law concerning the administrative complaint procedures is limited (see OECD Sub-indicator 1[h]). The listing of core procedural steps and features for a review process provided in the WTO GPA (Article XVIII[6]) may be a helpful guide.

188. The availability of a meaningful avenue for review for bidders that is the subject of the final chapter of the UNCITRAL Model Law is one of the core elements to be considered when assessing the adequacy of the procurement system, including in the context of the EU procurement regime (see the EU Remedies Directive) and the WTO GPA (Article XVIII; see also GPA Checklist Questions 32-34).

189. One aspect of misalignment is the time limitation on filing a complaint. The Procurement Law (in the newly added third subparagraph of Article 37[5]) provides a time period of 15 days from the publication of the announcement of the results of the procurement proceeding. By contrast, the formulation in the WTO GPA (Article XVIII[3], in line with the UNCITRAL Model Law, e.g., Article 53[2]) refers to a minimum period of no less than "10 days from the time when the basis of the challenge became known or reasonably should have become known to the supplier." Moreover, it would be preferable for the complaint procedure to be initiated as soon as the bidder finds out about a problem. By linking the time period to the publication of the announcement of the awards, it would seem that all complaints are being pushed to the latest possible stage rather than being resolved as early as possible.

190. The UNCITRAL Model Law (Article 53) provides, the WTO GPA encourages, and the EU Remedies Directives (Article 1[3]) authorizes the possibility that the first stage of review should involve submission – or at least an *a priori* notification – of the complaint directly to the procuring entity (in the Model Law, review by the procuring entity is the first step only if the procurement contract has not yet been concluded). No such first step is provided in the Procurement Law. It may be useful to include such a stage with the goal of promoting simplified, early solutions to certain complaints.

191. The crucial objective of all of these international standards is to provide aggrieved bidders with an impartial and independent review mechanism (see OECD Sub-indicator 10[e]). However, the independence (and potentially the impartiality) of the administrative review system established by the Procurement Law has been compromised. This is because the designated independent review body is the Interdepartmental Commission, which includes three representatives of the Tender Chamber and three representatives of the Verkhovna Rada that are at the same time already involved in oversight and (to one extent or another) in operational aspects of the procurement system. Moreover, as already noted, the roles of the Tender Chamber and Verkhovna Rada – some deputies of which participate in the Tender Chamber – are marred by conflicts of interests, Constitutional questions, and allegations of links to corrupt practices.

192. From the standpoint of best practices, the greater the extent to which a procurement complaint system relies on the judiciary for obtaining truly independent reviews, the lower the rating that may be given to the complaint system (see OECD Sub-indicator 10[a]).

193. Some concerns have been raised about the vulnerability of the complaint procedure to manipulation by unscrupulous bidders intent on delaying procurement proceedings and extending deadlines, citing the suspension that is triggered by the filing of a complaint with the Interdepartmental Commission (Article 37[2]). No mention is made of the possibility of exclusion

of the suspension on compelling public interest grounds in the case of a complaint to the Interdepartmental Commission (such an exception is envisaged in the UNCITRAL Model Law Article 52[2][a], the EU Remedies Directive Article 2[4], and the WTO GPA Article XVIII[7][a]). Complaints filed following the conclusion of the contract result in a suspension of the payment procedure for the indicated period (Articles 37[3] and 37-1[1], fourth subparagraph). No suspension (and no suspension of payment) is provided in the case of an appeal to the courts if a decision on the complaint has already been rendered by the Interdepartmental Commission (Article 37-1[1], third and fourth subparagraphs) or if the complaint was filed by a complainant that "did not acquire the status of bidder" (Article 37[4], fourth subparagraph). Such a limitation – which may be directed at limiting frivolous complaints and undue disruption of the procurement process – should not preclude complaints (possibly triggering suspension of the proceedings) from potential bidders who were unjustifiably excluded from being "bidders."

194. The question of interim measures such as suspension illustrates the general need for the legal framework to include some additional detailed provisions on implementation of the review procedure.

195. At the same time, there are provisions that seem to lend themselves to possible manipulation by unscrupulous procuring entities. Article 37(2), third subparagraph authorizes the cancellation of a procurement proceeding if the procuring entity refuses to comply with documentary disclosure requirements mandated by Article 37. Article 37-1 provides another possibility for a questionable maneuver by permitting the procuring entity to cancel the procurement proceeding and start all over again in case of a suspension of the procurement proceeding triggered by a complaint filed with the court. That is a provision fraught with risk of manipulation and undermining the integrity of and confidence in the procurement process.

196. A positive feature of the complaint system is the mandatory publication (albeit by the procuring entity) of decisions on complaints (Article 4-1[1]; see OECD Sub-indicator 10[d]).

197. It may be noted that according to the Procurement Law (Article 3-3[7], fourth subparagraph) all decisions of the Interdepartmental Commission (not only its decisions on complaints from bidders pursuant to Article 37) may be appealed to the Court.

198. Another important measure for strengthening the anti-corruption fight in the procurement sphere would be to bolster whistle-blower protection.[11]

F. MAINTAINING A REGISTER OF UNSCRUPULOUS BIDDERS

199. Among the most recent amendments to the Procurement Law, the addition of provisions on debarment (blacklisting) of bidders is particularly significant (Article 16). A listing of the possible grounds for debarment (Article 16[1]) and designation of the Interdepartmental Commission as the authority to maintain the register (Article 16[2]) are included. However, procedures to assure due process in the debarment decision are not specified.

200. Internet publication of the list of debarred bidders is required (Article 16[4]). However, as in the case of the provisions on complaints from bidders, the legal framework should provide additional procedural details to ensure due process in the debarment procedure (see OECD Sub-indicator 1[d]).

G. MAINSTREAMING THE FIGHT FOR INTEGRITY IN PUBLIC PROCUREMENT

201. There are some signs of growing public interest in procurement integrity issues. For example, a civil society organization has organized protests in the capital and promoted public dialogue that calls for reform of the procurement system. Some businesspeople have also publicly called for reform of the procurement system for the types of reasons cited in this report. In the health sector, procurement performance and compliance are closely monitored by NGOs, and there are strong constituents for procurement reform and capacity building (see Annex A). This is an indication that there may be increasingly fertile ground in civil society for "mainstreaming"

[11] USAID, *Corruption Assessment: Ukraine. Final Report* (February 10, 2006), 15.

procurement reform and integrity issues, an indispensable component of a successful anti-corruption strategy (see OECD Sub-indicator 12[e]).

H. MAIN RECOMMENDATIONS FOR ACCOUNTABILITY, TRANSPARENCY, AND ANTI-CORRUPTION MEASURES

202. The following are the main recommendations for accountability, transparency, and anti-corruption measures:

(1) Include a code of conduct for participants in public procurement (including public officials and bidders, contractors, etc.) and stiffen sanctions for violations of procurement rules in the next version of the Procurement Law;

(2) As mentioned in Recommendation II(1), establish independent, conflict-of-interest-free mechanisms for oversight and monitoring of the procurement process, including secure reporting of fraudulent, corrupt, and unethical behavior;

(3) Establish a truly independent mechanism for administrative reviews of complaints from bidders;

(4) Develop additional procedural rules for the complaint procedure that are aligned with international standards;

(5) Develop additional procedural rules for the debarment procedure; and

(6) Launch a systematic and sustained public awareness and sensitization program with the goal of mainstreaming procurement reform and integrity issues.

ANNEX A

OVERVIEW OF PUBLIC PROCUREMENT IN THE HEALTH SECTOR

SUMMARY

1. This Annex is an overview of public procurement in the health sector. Major expenditures are made at all levels of government in Ukraine using both domestic and international assistance funds. The system faces many hurdles, including the following:

   (a) The financial effects of the collapse of the Soviet Union and entry into the market economy environment, including funding problems resulting in an increasing share of what had been freely provided now being made available only for "donations" or "voluntary payments" (e.g., in order for a patient to obtain pharmaceuticals);

   (b) The size and needs of the population to be served (an aging population, high rates of HIV and TB, an ultimately indeterminate number of Chernobyl victims, etc.);

   (c) The need to reform the health sector in order to improve efficiency and allocation of resources, and a low rate of private health insurance (primarily because the population cannot afford it);

   (d) Poor and unreliable needs forecasting, planning, and budgeting practices;

   (e) Chronic overpricing due to restriction of competition (e.g., only domestic "resellers" typically participate in public procurement proceedings) and inadequate pricing analysis capacity and practice; and

   (f) Violations and corrupt manipulations to skew competitive procedures (e.g., in formulation of specifications, and combining and packaging procurement purchases) to restrict competition, as well as in the process of registration of pharmaceuticals.

2. The capacity and practices of the Ministry of Health are receiving increased attention due to past difficulties in donor-funded loan and grant programs focusing on HIV treatment. Some measures involving restructuring of the procurement process for re-activations of donor-funded procurement are already in place. In another instance, the special measure of handing over the task of procurement to an NGO was a condition for lifting a suspension of a grant.

3. Various NGOs and international organizations (e.g., the WB, Global Fund, USAID, WHO, UNAIDS, William J. Clinton Foundation, International HIV/AIDS Alliance, and the All-Ukrainian Network of People Living with HIV) are working to establish capacity building and transparent, truly competitive procedures for the Ministry of Health as well as participating in expert committees to ensure transparency and economic procurement. For example, in the Global Fund's sixth round (a proposed USD 151 million grant for HIV programs), the procurement is initially to be conducted by an NGO, with a later turnover of procurement to the Ministry of Health when the requisite capacity and transparent procedures are being exercised in a proven and verified manner (though the NGO will retain financial control).

4. In the context of HIV, there is an active, vocal, and constructive constituency for procurement reform, and failures in procurement procedures have been made highly visible (e.g., grossly overpriced procurement of pharmaceuticals). The push by the diverse group of stakeholders in this sphere provides a living example of procurement reform being "mainstreamed" (see Paragraph 173 of the report). In the HIV community – and perhaps beyond – there is a growing interest of stakeholders in and expectations for the procurement reform process because it affects them directly.

1. BACKGROUND

1. The health sector constitutes one of the largest sectors of public procurement in Ukraine. As such, health sector procurement counts as one of the main areas of opportunity for the fight against corruption in state procurement.[12] The Ministry of Health (hereinafter referred to as the "MOH") is responsible for a very high volume of public procurement and exercises broad regulatory powers. At the same time, procurement in the health sector is also carried out by other authorities, including the Ministry of Defense, research clinics, and the Academy of Medical Sciences. Moreover, in the wake of decentralization of budgeting and funding of health services, a large amount of overall medical spending (estimated at 80 percent) is performed by oblast and local authorities.

2. The functional and budgeting decentralization that has been implemented presents additional challenges for establishing and funding harmonized best practices in health sector procurement nationwide, in a health care system that has been slow to adapt to and continue to meet health care needs in a satisfactory and sustainable manner.

3. Only some programs are funded on a centralized basis (for example, in the HIV field). Maintenance of health facilities is conducted using State Treasury funds. Due to problems that have occurred in terms of low quality and inflated prices for procurement of medical equipment, planning and procurement of complex medical equipment has been centralized.[13]

4. The public health system consists of thousands of state-owned treatment centers throughout the country.[14] The system has been described as still displaying various characteristics and effects of the Soviet system and the post-Soviet era of transition that combine to leave the system unable to meet the needs of the population. These factors include the following:

   a) A vertical organizational structure;

   b) A need for significant investment and upgrading (especially in the more remote areas) of ageing facilities and equipment, a process that has been slow;

   c) A severe, continuing funding crisis rooted in the transition to a market economy and the economic and funding shrinkage that ensued in the wake of the collapse of the Soviet Union;

   d) Outdated means and standards for forecasting the operating and capital needs of the health care system (the "Semashko model," resource allocation based on the number of beds and number of visits) and for managing resource allocation and expenditures, hindering rational use of resources;

   e) A doctor-to-population ratio that is lower than the European average;

   f) A protracted struggle to define the extent to which the public health care system can fulfill the traditional mandate of providing free health care;

   g) Low wages for doctors resulting in abandonment of the medical profession, and the need for patients to make voluntary or informal payments in order to obtain treatment (even for services that are nominally supposed to be available free of charge by law and policy); and

   h) Inability to establish universal social health insurance thus far, and very limited development of the private health insurance industry (also due in particular to the inability of the population to afford such policies).[15]

[12] See USAID, *Corruption Assessment: Ukraine. Final Report* (February 10, 2006), p. viii, where it is suggested that the health sector should be targeted as a key government sector that may be used as a starting point for a comprehensive anti-corruption program that will serve as a model for other entities in the future.

[13] See Ministry of Health Order No. 179 (May 16, 2002, with subsequent amendments).

[14] In 2004, the health care network consisted of 6,660 outpatient and 2,668 inpatient facilities, of which 86 percent were publicly owned (See Section 4.4.4[a] of the Ukraine Proposal for the Global Fund, Sixth Call for Proposals, Geneva, May 5, 2006).

[15] For an overall assessment of the health care system in Ukraine, see V. Lekhan, V. Rudiy, and E. Nolte. *Health Care Systems in Transition: Ukraine* (Copenhagen: WHO Regional Office for Europe on Behalf of the European Observatory on Health Systems and Policies, 2004). Shrinkage of public health funding is described on pp. 33 et seq.

5. In addition, it is said that the health system is still feeling the latent effects of the historical "expert opinion" approach that characterized health care in the Soviet era rather than on the modern "evidence-based medicine" approach, which relies on empirical evidence of health benefits in order to determine appropriate treatments. The economics of the health care system have been put under particular stress due to the transition to a market economy (e.g., increased costs of pharmaceuticals as well as energy and other operating costs).[16] There has been an acknowledgement of the need to reform the health care system. However, such steps have been fragmented and slow in implementation.

6. Ukraine faces a number of serious challenges in the health sector. It has one of the higher HIV/AIDS infection rates as well as a tuberculosis situation that is regarded as a global threat because of the presence of multi-resistant strains. Because of this and other factors, the health sector is probably the largest area of foreign assistance, with prominent players including the Global Fund, the World Bank, and USAID. The national government's health budget is being increased significantly to meet those challenges (e.g., in 2004, 3.5 million UAH was allocated for HIV programs).

7. While there is a large volume of annual health sector procurement by the MOH using national budget funds, serious weaknesses in procurement in the sector have been highlighted in the implementation of foreign-assistance-funded health sector procurement. In fact, problems in public procurement (e.g., inadequate transparency and competition, and exorbitant prices that have been grossly out of line with available market prices accessed by international organizations) have been prime factors leading to suspension of such assistance (in the case of a Global Fund grant and a World Bank loan), and their resumption only on the basis of procurement arrangements being altered to one extent or another.[17]

8. Indeed, the MOH itself has acknowledged and expressed a commitment to address procurement capacity problems. For example, in Ukraine's application in the sixth round of the Global Fund (which is currently being finalized and would provide USD 151,077,432 in grant money for HIV/AIDS programs; hereinafter referred to as "the GF Application"), the MOH has not been listed as a direct recipient of the funds. Indeed, a lack of procurement and supply management capacity in the public sector is listed as one of the main constraints in fulfilling needs specific to the HIV/AIDS crisis.[18] Instead, a provision is made in the grant proposal for including a capacity-building mechanism for strengthening the overall procurement and supply management capacity of the MOH. The aim is that in the third year – when the annual allocation actually doubles from the preceding year – the MOH might take over procurement implementation, though subject to no objection from the NGO concerned (the All-Ukrainian Network of People Living with HIV).[19] This is particularly significant because it also reflects recognition by the donor community of the importance of building permanent capacity in healthcare procurement and supply management.

9. Apart from HIV and TB, additional large-scale challenges facing the healthcare system in Ukraine (some of which exacerbate HIV and TB risks) include a very large (and potentially growing) number of Chernobyl victims, high rates of cardiovascular disease, high rates of smoking, serious rates of intravenous drug use, an increase in commercial sex work, an aging population, problems with water quality, and the general worsening of the population's health that has occurred as part of the economic decline and reduction of living standards that followed the collapse of the Soviet Union.

[16] See V. Lekhan et al.

[17] For example, in the case of the Global Fund, the suspension of a large grant that involved procurement for HIV and TB testing and treatment was lifted only following the transfer of procurement to an NGO, the International HIV/AIDS Alliance.

[18] See Section 4.4.4(b) of the Ukraine Proposal for the Global Fund, Sixth Call for Proposals, Geneva, May 5, 2006.

[19] See Section 4.4.4(a), last paragraph of the Ukraine Proposal for the Global Fund, Sixth Call for Proposals, Geneva, May 5, 2006.

2. THE HEALTH SECTOR INDUSTRY

10. The recent history and particular characteristics of the health sector industry in Ukraine contribute significantly to the current state of public procurement in this field. For example, domestic producers of pharmaceuticals occupy the lowest level in the pharmaceuticals market. Production equipment inherited from the Soviet era – outdated and in poor condition – has required extensive investment in repair, maintenance, and retooling. This has precluded investment by these producers in a wider spectrum of products (including new drugs), leading to a loss of market share for domestic producers. In contrast, resellers of imported pharmaceuticals have gained the upper hand. Moreover, some resellers are believed to have been particularly successful in using bribes in order to meet drug registration requirements.

11. Indeed, one of the key factors driving up prices in health sector procurement is the fact that procurement is typically from resellers rather than directly from manufacturers. In some cases, a chain of resellers is involved in which the price rises at each stage. The underpinnings of such a system include the requirement that drugs may be procured only from a seller registered in Ukraine, which in turn helps resellers control the market and limit competition. This in turn has kept prices artificially elevated and has led to decreased quality.

12. Inefficiency, a lack of transparency, corruption, and other problems in the procurement process have particularly negative effects on the extent to which those in need can receive necessary treatment. For example, HIV treatment is only being provided to a fraction of those actually affected.

13. Constraints on manufacturing include the general need to import raw materials rather than being able to produce them domestically. This has constrained domestic production of anti-retroviral (ARV) drugs in particular. Domestic requirements for ARV drugs are fulfilled to a significant extent by imports of generics. In contrast, domestic production of TB drugs outstrips domestic needs.

14. However, chronic quality deficiencies in TB pharmaceuticals currently procured pose a threat to the application of the Directly Observed Treatment, Short-Course (DOTS) strategy that is universally acknowledged as being the only scientifically proven cost-effective method of treating TB. It depends on the use of standard treatment protocols that include administering medication that meets requisite quality standards. The well-entrenched, well-connected, and traditionally powerful interests in the "TB lobby" – including resellers of low-quality imported drugs – have been able to rely on a lack of transparency (including in the procurement process) in order to continue to make profits on substandard drugs, and are prone to resist moves to import quality TB drugs.

15. The medical implications of failing to apply the DOTS treatment strategy properly (including use of quality drugs) are grave and account for Ukraine being classified as a country of global threat in terms of TB. Failure to apply proper treatment strategies and administer quality drugs promotes the incidence of "multi-resistant" strains of TB (i.e., strains of TB that are resistant to medication). Failure to ensure that first-line drugs administered meet requisite quality standards promotes development of resistant TB strains that require use of "second-line" drugs that are more expensive. Moreover, once quality problems compromise the second-line drugs and promote further resistant strains, there is no third line of drugs available.

16. It has been suggested that at least part of the solution could be found in promoting the importation of quality raw materials from reputable international sources, but there has been resistance to such moves by entrenched broker interests.

3. REGISTRATION

17. Mandatory registration of pharmaceuticals is administered by the State Service of Medical Means and Products of Medical Purpose (part of the MOH). While registration is subject to rules that are considered to be strict, there are reports of corruption of the registration process, with registration being accorded to low-quality products without quality testing. Public purchasers –

even including those for international projects in some cases – may then be obligated to buy these products at inflated prices.

18. Some mitigation of these practices has been reported due to the possibility of using the WHO Prequalification List.[20]

4. PROCUREMENT PLANNING

19. As is generally true for the procurement system, planning of procurement in the health sector is a major area of deficiency. It appears that the timing of procurement during the course of the year in particular is not reliable or necessarily predictable, and in some cases, the items that are actually procured might not be known in advance by end users when particular items are grouped together in a single budget line.

20. The effectiveness of procurement planning is hampered by various difficulties and deficiencies in collecting information on and forecasting health care needs as well as planning and budgeting. For example, outdated and insufficiently precise forecasting formulas and budget allocation methodologies are used that fail to calibrate the distribution of scarce resources to actual needs. A norm of eight hospital beds per 1,000 people is applied instead of more global standards, and norms for hospital beds per specialty have yet to be elaborated. Continuing to use such rigid, outdated measurement tools precludes effective management.[21]

21. Other factors contributing to difficulties in procurement planning (and implementation) include unreliable data for needs assessment; uncertainty as to the extent to which medical services, pharmaceuticals, and supplies are made available to patients by way of out-of-pocket payments (or would continue to be available free of charge; out-of-pocket payments constitute a very significant share of total health care spending in Ukraine)[22]; and inadequacies in coordination between the MOH and the Ministry of Finance, delays in budget preparation and allocation of budgeted funds, and bureaucratic delays in the procurement process.

22. The procurement planning stage appears to be one where added attention is required to ensure the integrity of the procurement process. The view seems to abound that certain preferred bidders receive early warnings of upcoming procurement proceedings, including information about specific quantities required and the price ranges expected to be paid – information that they can then utilize in order to be prepared to make the supplies in question. It is also alleged that procurement packages are arranged so that only certain preferred bidders are able to supply the particular array of goods required.

23. A national essential drug list type of mechanism has been established, though it is not fully aligned with the WHO standard. The purpose of the list is to indicate what may be procured with funds from the national budget. There have been debates and struggles regarding the inclusion of generics (which have been admitted). Moreover, in 2003/2004 the MOH agreed to utilization of the WHO Prequalification List, which helps to ease registration of quality drugs and pressures of corruption to some extent.

24. At the same time, transparency and regularity seem to remain lacking in the preparation of technical specifications and other descriptions of procurement requirements that are subject in some cases to inexplicable changes introduced outside of normal channels (e.g., substitution of pages in technical specifications after they have already been approved by designated technical review committees), perhaps to suit the needs of steering the procurement process in a particular direction. It has been suggested that one safeguard measure would be to establish "specification committees" involving key non-governmental stakeholders and civil society in order to verify the

[20] Information on the WHO Prequalification Programme is available at the following Web site: http://mednet3.who.int/prequal.

[21] See V. Lekhan et al., 26.

[22] Concerning the question of free versus fee-based public health services and out-of-pocket payments, see V. Lekhan et al., 36-42. As for out-of-pocket payments for pharmaceuticals, one is left wondering to what extent patients making such payments are purchasing pharmaceuticals that have already been procured by the state at potentially exorbitant prices as described elsewhere in this Annex.

process of preparation of technical specifications and to ensure that the procurement notice and bidding documents reflect the correct technical specifications and have not been manipulated.

25. Manipulations and falsifications are also reported to have taken place in needs assessments (e.g., overstating the need to procure particular pharmaceuticals when in fact those pharmaceuticals were in stock at an adequate level).

5. SUPPLY CHAIN MANAGEMENT

26. Weaknesses in procurement planning are symptomatic of systemic management weaknesses throughout the supply chain, spanning assessment and forecasting of demand, acquisition procedures, and the storage and distribution stages. For example, there appears to be no uniform system of accountability for security and usage of supplies that have been procured, including inspection and receipt procedures. The result is the increased risk that what is actually delivered will be at variance with what was stipulated in the procurement proceedings in terms of quantity.

27. Other indicators of weakness in supply chain management include time lags between exhaustion of supplies and restocking that directly impact the ability to administer therapies involving combinations of drugs. As already noted, budget preparation and allocation practices also directly impact the ability to plan for and predict the timing of availability of needed medications. Budgeting delays have led in some cases to distorted practices such as premature conduction of procurement proceedings at the tail end of the budget year in order to obtain medicines actually needed during the next budget cycle in anticipation that the next budget will not be finalized for a protracted period of time. This may in turn exacerbate the problem of availability of funds to pay for entering into contracts on such a basis.

6. PRICE ESTIMATION

28. A particularly significant problem that could be considered to be one of the weakest aspects of procurement planning practices concerns the question of market price research and estimation. The priority that must be accorded to correcting this most fundamental defect in the health sector procurement process is obvious in view of the chronic problem of substantially (if not exponentially) higher prices being paid as part of MOH procurement of pharmaceuticals.

29. The attachments to this annex (prepared by the All-Ukrainian Network of People Living with HIV, hereinafter referred to as "the NPLWH") illustrate the vast differences between prices paid by international organizations and the MOH for HIV drugs. In some cases, generics are being procured for the same prices as branded drugs even though the branded drugs are still relatively new and their generic versions should therefore be cheaper. Such results reflect various problems in health sector procurement alluded to elsewhere in this report, including barriers to free competition compounded by a lack of regulation and the practice of uncritical acceptance of prices offered in bidding documents. Thus, in many cases even the lowest-priced bid provides a seriously inflated price as compared to market standards.

30. At the same time, the MOH seems to have failed to avail itself of lower prices by way of preferential pricing available through the William J. Clinton Foundation (despite having signed an agreement with the Clinton Foundation enabling it to do so) and other organizations such as Médecins Sans Frontières.

31. Such unfortunate practices contribute directly to the inefficient expenditure of scarce resources and the limited extent to which the target population is able to receive treatment. It is of paramount public health importance that the necessary mechanisms and capacity for price research and analysis be established without delay. The occasion to do so may be presenting itself, as the Cabinet of Ministers (CMU) has tasked the MOH with establishing "marginal prices" (i.e., ceiling prices) for pharmaceuticals procurement pursuant to the Budget Law. In establishing such mechanisms and procedures, reference should be made to international pharmaceutical pricing

resources that would facilitate establishment of market-based, most favorable pricing practices in the MOH.[23]

7. TREATMENT STANDARDS

32. While national treatment standards have recently been introduced with respect to HIV, this generally has not been done for other diseases. National treatment standards should be elaborated based on internationally recommended standards and treatments.

8. SOLICITATION AND RECEIPT OF BIDS

33. As noted above, the practice of restricting contract awards to suppliers registered in Ukraine reduces competition and directly contributes to sharply elevated prices and quality problems. The remedies would include publishing invitations to bid in internationally accessible media (and in English), and to eliminate the requirement for suppliers to have an official branch in Ukraine in order to submit bids.

34. Abuses have been reported in terms of the confidentiality of bids, including disclosure of bid prices prior to bid openings. It would therefore be essential to ensure implementation and enforcement of the basic transparency and anti-corruption requirement of submission of sealed bids.

9. BID EVALUATION PRACTICES

35. In addition to the requirements and practices that restrict competition that have already been alluded to (limitation of procurement proceedings to companies registered in Ukraine, i.e., resellers; manipulation of procurement packaging; early warnings to favored suppliers), other types of ploys that are reportedly used to limit competition include rejection of bid securities on hyper-technical grounds and rejection of bids on hyper-technical formal grounds.

36. At the same time, while legitimate competitors are being excluded on non-material hyper-technical grounds, inadequate scrutiny of bids for real violations leaves the bidding process prone to being compromised and manipulated (e.g., through submission of multiple bids by the same bidder under the false guise of different company names).

37. Transparency and compliance in health sector procurement would also be promoted by publication of comprehensive results of procurement proceedings in print and electronic media.

10. CAPACITY-BUILDING INITIATIVES

38. As alluded to above, inadequate capacity to properly plan and conduct the procurement process is a fundamental factor in the difficulties that plague procurement in the health sector. The fact that Ukraine's application for funding in the Global Fund's Sixth Round includes a program for strengthening procurement and supply management capacity in the MOH is a positive sign of serious intent to do more to tackle the issues that have long plagued procurement in the health sector.

39. The capacity-building component envisaged in the GF Application would involve assessment of MOH procurement capacity and procedures, provision of technical assistance and expertise to the MOH (at the MOH), participation of MOH staff in technical aspects of procurement proceedings being conducted during the initial two-year transitional period by the concerned NGO (the NPLWH) and, in the third year, a takeover of the project's procurement process by the MOH.

40. In particular, it is proposed that the development and approval of technical specifications that has been a stage subject to non-transparent practices would involve a multidisciplinary working group including representatives of international organizations and the NPLWH. Moreover, the announcement and the bidding documents would be verified in order to ensure that they actually reflect the approved technical specifications. Similar safeguards are proposed for the bid evaluation stage. That approach has been slated to be piloted by the MOH in the near future. The third-year

[23] Pursuant to World Health Assembly Resolution WHA 54.11, the WHO has established a gateway to reputable reference materials concerning price information for medicines that may be accessed at the following address: www.who.int.medicines/areas/access/ecofin/en/index.html.

takeover by the MOH will only take place if it is adjudged that the MOH has developed the requisite capacity to perform along the aforementioned lines. However, the NPLWH is to retain financial control throughout the life of the project.

41. These arrangements have been agreed to by the MOH (the MOH's endorsement appears on the GF Application) and were the subject of a memorandum of understanding signed between the MOH and the NPLWH.[24]

42. New structures have also been established in connection with reinstitution of the World Bank loan that had been suspended due to very low disbursement linked to procurement. They involve special committees of the MOH Tender Committee that include participation by international organizations and NGOs (including the NPLWH). The functioning of the MOH in the context of these special structures will be examined as part of the upcoming assessment of the MOH in connection with the GF Application.

43. Concern has been expressed (including in the Ukraine GF Application) to the effect that the accession of Ukraine to the WTO and the related intellectual property rights/TRIPS aspects constitute a constraint on treatment of HIV. This points to the importance of ensuring adequate capacity available to analyze and properly implement obligations and other aspects of the TRIPS Agreement in health sector procurement, including (to the extent applicable and desirable) the relevant provisions of the Doha Declaration on TRIPS and Public Health (Article 17) and the related Doha Declaration on the TRIPS Agreement and Public Health (Article 6 in particular).

11. MAINSTREAMING PROCUREMENT REFORM IN THE HEALTH SECTOR

44. The very active involvement of various stakeholders in the assessment and implementation of the procurement process related in particular to HIV treatment and the leadership role being played by grassroots organizations (the NPLWH and other organizations such as the International HIV/AIDS Alliance, UNAIDS, WHO, and the World Bank) demonstrate that mainstreaming procurement reform in the health sector is actually taking place in Ukraine in terms of developing widespread expectations of reform. Therefore, as much as it requires special attention, health sector procurement reform may at the same time point the way toward effective strategies in mainstreaming and accomplishing real procurement reform.

[24] The capacity-building arrangements are outlined in the Global Fund Application, 113-114.

ANNEX B

FRAMEWORK OF POSSIBLE FEATURES OF A SINGLE-PORTAL GOVERNMENT WEB SITE FOR PUBLIC PROCUREMENT IN UKRAINE

An illustrative (i.e., non-exhaustive) framework of possible features and facilities that might be included in a single-portal Web site for public procurement is provided below. It should be noted that it is not necessary for the entirety of possible features and functionalities of the Web site (those listed below and perhaps others as well) to be established at the outset. In other words, the Web site can be developed in phases. For example, it initially could be used primarily for posting invitations to bid and pre-qualify, texts of the Procurement Law and Regulations, standard bidding documents, notices of contract awards, and the like.

In subsequent phases, additional functionalities may be added such as downloading bidding documents and pre-qualification documents, and, in a phased manner, various functionalities (or links thereto) referred to broadly as "e-procurement" (such as submission of bids, application for inscription in the register/list of bidders, and eventual links to procedures such as electronic reverse auctions and variants on "purchase-to-pay-systems" of electronic invoicing, electronic catalog/electronic marketplace facilities, etc.).

I. DISSEMINATION OF INFORMATION ABOUT THE PROCUREMENT SYSTEM

A. General information

(1) Bulletin board
(2) Newsletter
(3) National public procurement policy framework
(4) Publications

B. Information about the legal framework for public procurement

(1) The Procurement Law
(2) Regulations for implementation of the Procurement Law

II. INFORMATION RELATED TO PROCUREMENT POLICY OFFICES (PPOS)

(1) Descriptions of functions of PPOs, organizational descriptions and charts, staff, and contact information
(2) Annual reports on activities of PPOs
(3) Annual reports on the procurement system, including statistical reports
(4) PPO policy statements, circulars, guidance notes
(5) Newsletters
(6) Contact information

III. INFORMATION ABOUT PROCUREMENT OPPORTUNITIES

(1) Invitations to bid and to apply for pre-qualification, searchable by types of procurement according to a nomenclature and/or other indexing system
(2) Publication of "buyer profiles," including annual procurement plans

IV. INFORMATION ABOUT THE OUTCOME OF PROCUREMENT PROCEEDINGS

(1) Publication of contract award notices
(2) Publication of notices concerning unsuccessful and canceled procurement proceedings

V. INFORMATION FOR PROCURING ENTITIES

(1) Available framework agreements (e.g., for procurement of common-use supplies, IT, vehicles, and provision of electronic reverse auction services)
(2) Standard Bidding Documents (including General Conditions of Contract)
(3) Various standard forms for conducting procurement proceedings
(4) Forms for statistical/other reporting
(5) Training materials (possibly including online training and testing programs)
(6) List of blacklisted bidders
(7) Reference market price information
(8) Frequently Asked Questions (FAQs)

VI. INFORMATION SPECIFICALLY FOR AND ABOUT BIDDERS

(1) Guides on how to do business with the Government of Ukraine
(2) Information about lists/registers of bidders
(3) Downloads and submission of applications for inclusion in lists/registers of bidders
(4) Publication of lists/registers of bidders
(5) Information about complaint procedures (possibly including e-filing of complaints)
(6) Frequently Asked Questions (FAQs)

VII. FACILITIES FOR BASIC E-PROCUREMENT-RELATED FUNCTIONALITIES (E-TENDERS)

(1) Downloads of bidding and pre-qualification documents
(2) Submission of applications to pre-qualify
(3) Submission of bids
(4) Posting of clarifications and modifications of bidding and pre-qualification documents

VIII. FACILITIES FOR OTHER E-PROCUREMENT-RELATED FUNCTIONALITIES (INCLUDING A POSSIBLE "PROCURING ENTITY ONLY AREA" FOR REGISTERED USERS OF CERTAIN E-PROCUREMENT SERVICES)

(1) Links to electronic-reverse auctions
(2) Links to purchase-to-pay/electronic marketplaces and similar facilities
(3) Help desks

IX. DISCUSSION FORUMS

For exchanging information and questions and answers concerning public procurement.

X. CONSULTATIVE COUNCILS AND WATCHDOG GROUPS

XI. DISPOSAL NOTICES

Information on disposal of excess/surplus supplies is also posted on procurement Web sites of some systems.

XII. USEFUL LINKS

ANNEX C

TIMELINE FOR IMPLEMENTATION OF RECOMMENDATIONS

No.	Recommendation	2007	2008-2009	2009-2010
I.	**Main recommendations for the legal framework**			
I(1)	Revise or replace the Procurement Law to address the problems identified in this and other recent assessments, including for purposes of alignment with the EU and WTO GPA procurement principles			
I(2)	Review and reduce the number of exceptions to the scope of application of the Procurement Law, including for purposes of alignment with the EU and WTO GPA procurement principles			
I(3)	Consolidate and complete the legal framework for public procurement through issuance of a consolidated set of regulations, providing uniform detailed procedures for implementation of the Procurement Law			
I(4)	Complete the legal framework through GOU issuance of standard bidding documents (including General Conditions of Contract) that are mandatory for procuring entities and available to them free of charge without any copyright restrictions or fees imposed (using, if feasible, the draft SBDs prepared at an earlier stage)			
I(5)	Prepare and issue an official practice manual free of charge to procuring entities (using, if feasible, the draft manual prepared at an earlier stage)			
II.	**Main recommendations for the institutional framework**			
II(1)	Re-establish and consolidate independent policy and oversight functions for the procurement system, removing fragmentation of authority, institutional conflict of interest, and involvement of the legislative branch and non-state sector in functions properly belonging to the executive branch (by creating an independent body reporting directly to the Cabinet of Ministers or to the President, restoring the former DCSP in the Ministry of Economy and its functions, or assigning the full range of policy and oversight functions and the necessary resources to the Antimonopoly Committee)			
II(2)	If it is to be retained, convert the Tender Chamber into a truly non-governmental civil society organization that is not involved in any operational or administrative functions related to implementation of the procurement process			
II(3)	Develop improved and automated systems for collection and analysis of statistical information on procurement activities			
II(4)	Develop and implement a strategy for raising the level of professionalism in the procurement function, including through establishment of dedicated procurement units in procuring entities staffed by a cadre of procurement professionals with career advancement possibilities within the procurement function			
II(5)	Provide the capacity-building programs needed on an ongoing and graduated basis for personnel implementing procurement proceedings as well as those conducting internal and external oversight of procurement			
III	**Main recommendations for procedures and practices**			
III(1)	Establish an official GOU "single-portal" Web site for Internet publication of information required by the Procurement Law to be published on the Internet (on which publication of information including invitations to bid or to apply for pre-qualification will be mandatory) in addition to other functions that such a Web site may perform			
III(2)	Provide capacity building and improved procedures for procurement budgeting and planning			
III(3)	Consolidate the register of participants in procurement proceedings and the catalog of participants into one facility operated by a government entity, and elaborate procedures in line with EU Directives and the WTO GPA to ensure that this procedure does not restrict competition or create barriers to entry			

III(4)	Eliminate the "price reduction" phase that has been added to the open bidding method			
III(5)	Eliminate the "reduction of price" (reverse auction) procedure or convert it into a purely electronic reverse auction in line with the EU Procurement Directive and the WTO GPA			
III(6)	Add a procurement method designed specifically for procurement of consultative services in line with the UNCITRAL Model Law			
III(7)	Develop and implement methodology for technical descriptions and specifications that enhance (rather than unnecessarily restricting) competition and enable bidders to submit bids responsive to the needs of the procuring entity and provide for usage of international nomenclature (e.g., the EU CPV)			
III(8)	Increase the minimum time periods for submission of bids in bidding proceedings on a general basis			
III(9)	Clarify and simplify requirements for bid securities in order to avoid their manipulation, and introduce alternatives such as bid-securing declarations			
III(10)	Develop and implement more sophisticated and accurate methods of evaluation and comparison of bids			
III(11)	Limit the permissible cases and tighten procedures for cancellation of procurement proceedings			
III(12)	Develop and implement an integrated strategy for electronic procurement with the appropriate authorization and basic standards provided in the Procurement Law, in line with international standards such as those in the EU Procurement Directives and the revisions to the UNCITRAL Model Law and in coordination with e-Government and "electronic Ukraine" initiatives			
IV	**Main recommendations for accountability, transparency, and anti-corruption measures**			
IV(1)	Include a code of conduct for participants in public procurement, including public officials and bidders, contractors, etc., in the next version of the Procurement Law			
IV(2)	As mentioned in Recommendation II(1), establish independent, conflict-of-interest-free mechanisms for oversight and monitoring of the procurement process, including secure reporting of fraudulent, corrupt, and unethical behavior			
IV(3)	Establish a truly independent mechanism for administrative review of complaints from bidders			
IV(4)	Develop additional procedural rules for the complaint procedure that are aligned with international standards			
IV(5)	Develop additional procedural rules for the debarment procedure			
IV(6)	Launch a systematic and sustained public awareness and sensitization program with the goal of mainstreaming procurement reform and integrity issues			

ANNEX D
LIST OF MEETINGS

#	Person	Title	Organization	Contacts
1	Stefanovskiy, Serhiy Stefanovych	First Deputy Chairman	Antimonopoly Committee of Ukraine	45 Urytskoho Vul. +38 (044) 251-6211 melnichenko@amc.gov.ua
2	Kravchenko, Yuri	First Deputy Chairman	Antimonopoly Committee of Ukraine	+38 (044) 251-6210 kravchenko@amc.gov.ua
3	Pyatnitskiy, Valery		Ministry of Economy of Ukraine	+38 (044) 226-2363
4	Tsymbal, Vyacheslav A.	Department of Cooperation with the WTO	Ministry of Economy of Ukraine	+38 (044) 272-5574 Tva_wto@mfert.gov.ua
5	Dergaliuk, Tamara Andreevna		Ministry of Economy of Ukraine	
6	Obushko, Nadezhda Mikhailovna	Head of the Procurement Unit	State Treasury of Ukraine	+38 (044) 281-4930
7	Krasnikov, Denis Anatoliyovych	Deputy Head	Main Control and Revision Office of Ukraine (KRU)	4 Sahaydachnoho Street +38 (044) 425-7363
8	Pershyn, Volodymyr Leonidovych	First Deputy Head of the Accounting Chamber of Ukraine	Accounting Chamber of Ukraine	7 M. Kotsyubinskoho Street +38 (044) 226-2687 rp@ac-rada.gov.ua
9	Pylypenko, Vyacheslav Pavlovych	Chief Controller, Director of the Department of Legal Provision and Government Procurement	Accounting Chamber of Ukraine	
10	Laba, Volodymyr Stepanovych	Chairman of the Board of Directors	Tender Chamber of Ukraine	6 Khreschatik Street +38 (044) 501-7891 +38 (044) 501-7892 +38 (044) 501-7893
11	Tovstanovskiy, Mykola Leonidovych	Vice President	Tender Chamber of Ukraine	
12	Kravchenko, Lyudmyla Ivanivna	Vice President	Tender Chamber of Ukraine	
13	Vaseyko, Andriy Ivanovych	Head of the Press Service	Tender Chamber of Ukraine	
14	Myroshnychenko, Viktor Volodymyrovych	Deputy Head of the State Procurement Department	Ministry of Health of Ukraine	7 Hrushevskiy Street
15	Tsenilova, Zhanna Valentynivna	Head of the Department of European Integration and International Relations	Ministry of Health of Ukraine	+38 (044) 253-5271 tsenilova@moz.gov.ua
16	Ivchuk, Volodymyr		Ministry of Health of Ukraine	+38 (096) 476-6675
17	Shmeleva, Irina	Procurement Officer	World Bank Country Office in Ukraine	1 Dniprovskiy Uzviz +38 (044) 490-6671
18	Wielogorska, Anna	Procurement Officer	World Bank Country Office in Ukraine	+38 (044) 490-6671
19	Oleynyk, Igor	Consultant	World Bank Country Office in Ukraine	+38 (096) 353-5314
20	Pokonevych, Igor	Head of the WHO Country Office in Ukraine	World Health Organization (WHO)	30 Borychiv Tik Street +38 (044) 425-8828 ipo@who.org.ua
21	Shakarishvili, Dr. Anna	UNAIDS Country Coordinator	Joint United Nations Programme on HIV/AIDS (UNAIDS)	14 Mykhaylovskiy Lane, Office 1-2 +38 (044) 206-1426 shakarishvilia@unaids.org
22	Saldanha, Vinay P.	Monitoring and Evaluation	Joint United Nations	+38 (044) 206-1425

#	Person	Title	Organization	Contacts
		Advisor	Programme on HIV/AIDS (UNAIDS)	saldanhaVP@unaids.org
23	Subbotin, Yuriy	Project Manager	Three Ones Project, UNAIDS	+38 (044) 253-1860 subbotiny@unaids.org.ua
24	Zhovtyak, Volodymyr	Head of the Coordination Council	All-Ukrainian Network of People Living with HIV	24b Mezhygirska Street +38 (044) 425-1274 Vladimir@network.org.ua
25	Filippovych, Sergiy	PSM Manager	International HIV/AIDS Alliance in Ukraine	5 Dimitrova Street, Building 10a, 9th Floor +38 (044) 490-5485 filippovych@aidsalliance.org.ua
26	Borushek, Iryna	Member of the Coordination Council	All-Ukrainian Network of People Living with HIV	+38 (044) 425-6989 +38 (067) 547-5780 borushek@network.org.ua
27	Lezhentsev, Konstantin		International Harm Reduction Development Program; Consultant to the All-Ukrainian Network of People Living with HIV	+38 (067) 693-4475 klezhentsev@gmail.com
28	Islam, Zahedul	Country Director	Clinton Foundation HIV/AIDS Initiative	24 Shovkovychna Street, Office 14 +38 (044) 253-4457 zislam@clintonfoundation.org
29	Lyapina, Ksenia	Verkhovna Rada Deputy	Chairperson of the Council of Entrepreneurs under the Cabinet of Ministers of Ukraine, First Vice President of the Tender Chamber of Ukraine	1a Andriyivskiy Uzviz +38 (044) 255-3585
30	Lyapin, Dmitri		Institute for Competitive Society	dlyapin@ics.org.ua
31	Kuzhel, Oleksandra	President	Academia Analytical Center	65 Prospekt Peremohy, Office 311 +38 (044) 536-0026
32	Rudneva, Olga	Executive Director	Olena Franchuk Anti-AIDS Foundation	42-44 Shovkovychna Street +38 (044) 490-4805 o.rudneva@antiaids.org
33	Linden, Gary	Director, Office of Economic Growth	USAID	
34	Schumacher, Judith S.	Director, Office of Program Coordination and Strategy, Regional Mission to Ukraine, Belarus, and Moldova	USAID	
35	Pittsyk, Dr. Myroslav	Executive Vice President	Association of Ukrainian Cities	4 Esplanada Street, Room 7 +38 (044) 284-3147 auc@rql.net.ua

ANNEX E

WORLD TRADE ORGANIZATION

GPA/35
21 June 2000

(00-2516)

Committee on Government Procurement

CHECKLIST OF ISSUES FOR PROVISION OF INFORMATION RELATING TO ACCESSION TO THE AGREEMENT ON GOVERNMENT PROCUREMENT

To facilitate consultations relating to accession to the Agreement on Government Procurement, please provide a description of the government procurement regime applied in your country by replying, to the extent possible, to the questions in the checklist of issues below. If there is no specific provision on a particular issue, the response should state this.

The information to be provided in this context is without prejudice to any additional information which Parties may wish to request from acceding governments on any other aspects of their procurement regimes. For each item on the checklist, please identify any legal or administrative actions that will need to be taken in order to align your government procurement regime with the requirements of the GPA and ensure full implementation of the Agreement following accession.

If your government is aware of any need for training or other capacity-building efforts relating to any of the items on this checklist, please describe the need in as specific and concrete terms as possible, and describe any steps your government is taking, whether independently or in cooperation with other Members or international organizations, to address that need.

I. LEGAL FRAMEWORK

Is there a single central law on procurement? If so, please specify?

What are the other laws, regulations, decrees, administrative rulings, decisions, policy guidelines and other instruments governing government procurement? Please provide a summary of the subject areas dealt with by each of these instruments. Please also explain the main differences (if any) that exist between their application at the central and sub-central levels of government and at other types of entities.

To what extent will the provisions of the Agreement be applied directly or need to be transposed into the relevant law? In the event of direct application of the Agreement over conflicting provisions of domestic law, please indicate the relevant legal basis.

II. SCOPE AND COVERAGE

Please summarize the organization of the government in your country at each level.

Please list all central government entities (ministries, departments, agencies, etc.) procuring goods, services and construction services.

What entities at the sub-central level of government (states, provinces, municipalities, etc.) procure goods and services?

Which are the enterprises owned or controlled by the government that are subject to the rules on government procurement? Which are the other entities or categories of entities (Annex 3-type entities) owned and controlled by the government that engage in procurement? Specify.

Do entities listed in response to questions 5, 6 and 7 apply in their procurement the main law (if one exists), other legislation provided by the federal or central level of government or are they autonomous from federal or central government in their procurement rules and practices? Where any of these entities are not subject to the main procurement law, please list the entities concerned and indicate which laws, regulations, etc., they are subject to. How will your government ensure the implementation of the Agreement by such entities below the central/federal government level?

Are there any general exceptions from the scope of application of the national procurement rules, for instance for essential national defence or security reasons? Please provide details.

Please provide available statistics on the procurement by government entities in your country in the last two years, including, to the extent available, a breakdown by entity and by categories of products and services.

III. NATIONAL TREATMENT AND NON-DISCRIMINATION

Identify the specific provisions in the legislation which reflect the national treatment and non-discrimination commitments of Article III of the Agreement.

Please provide details of any provisions in national legislation according domestic supplies and suppliers treatment more favourable than that accorded to foreign supplies or suppliers or according supplies or suppliers of any country more favourable treatment than those of any other country.

Please provide details of any provisions in national legislation allowing a locally established supplier to be treated less favourably than another locally established supplier on the basis of its degree of foreign affiliation or ownership or discriminating against locally established suppliers on the basis of the country of production of the good or service being supplied.

Please specify to what extent, if at all, more favourable treatment is granted to any sectors of the economy, regions or specific categories of suppliers or supplies.

Please specify any provisions requiring or allowing the use of offsets or measures with similar effect, such as domestic content, licensing of technology, investment, counter-trade or similar requirements in the qualification or selection of suppliers, products or services or in the evaluation of tenders and award of contracts.

IV. ELEMENTS SPECIFIC TO PROCUREMENT PROCEDURES

Please provide a general description of your existing procurement methods and procedures, including the main procurement methods used and a brief description of each method, and the extent to which qualification of suppliers and open, selective and limited tendering for each level of government is used.

Identify the provision in your country's legislation requiring non-discrimination as regards the qualification of suppliers in terms of Article VIII and selection of suppliers in terms of Article X. Indicate any exception to this requirement. What are the provisions ensuring non-discriminatory access of new suppliers to existing qualification lists?

In situations where qualification procedures and selective tendering may be used, to what extent do entities allow suppliers to become qualified during the procurement process? To what extent do entities maintain permanent lists of suppliers?

What are the conditions and circumstances foreseen in your legislation allowing the use of the limited tendering method under Article XV of the Agreement? What measures exist in order to ensure that this method is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discriminating among foreign supplies/suppliers or in favour of domestic supplies/suppliers?

Article XIV of the Agreement allows for negotiation under certain conditions. Are entities allowed to proceed to negotiations? If so, which categories and what are the conditions imposed?

Article XI sets out the minimum time-periods for tendering and delivery. What are the rules and practices regarding time-periods in your legislation? Does the legislation reflect the various minimum

time-periods as set out in the Agreement? If not, give information on any different time-periods which have been established in your national legislation.

Briefly describe the procedures for the submission, receipt and opening of tenders and awarding of contracts, in particular the procedures and conditions guaranteeing regularity of the openings and consistency with the non-discrimination provisions of the Agreement. How is the information on the proceedings related to the receipt, opening and evaluation of tenders maintained by entities?

Please identify the provisions in your legislation setting the parameters for the prescription of technical specifications by entities as part of the evaluation criteria.

Identify the measures in national legislation ensuring that awards are made in accordance with the evaluation criteria and essential requirements specified in the tender documentation.

V. INFORMATION

Article XIX:1 of the Agreement foresees the publication of laws, regulations, judicial decisions, administrative rulings of general application and procedures regarding government procurement. Please give the name of the relevant publication(s) and indicate the media used for this purpose. Please also provide, where available, the address of an Internet website where the legislation referred to in questions 1 and 2 can be found.

Article IX:1 of the Agreement foresees the publication of invitations to participate for all cases of intended procurement by entities. Please give the name of the relevant publication(s) and indicate the media to be used for this purpose. Please also provide, where available, the address of an Internet website where such invitations are published.

Please specify the types of information that your legislation requires to be included in notices of invitation to tender or in tender documentation, and identify the relevant provisions of your legislation.

Article IX:1 of the Agreement foresees publication of permanent lists of qualified suppliers by entities maintaining such lists. Please give the name of the relevant publication(s) and indicate the means used for this purpose. Please also provide, where available, the address of an Internet website where such lists are published.

Article XVIII:1 of the Agreement foresees the publication of details of contract award notices by entities. Please give the name of the relevant publication(s) and indicate the means to be used for this purpose. Please also provide, where available, the address of an Internet website where such notices are published.

Please specify the types of information that notices of contract awards should contain in your country and identify the relevant provisions in your legislation.

Please specify the relevant provisions in your legislation enabling, as foreseen in Article XVIII:2, the provision of information to other Parties and unsuccessful tenderers regarding the reasons why a tender was not selected.

VI. BID CHALLENGE PROCEDURES

Please provide information on existing challenge procedures.

Are there specific provisions enabling access of foreign suppliers to challenge procedures?

To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so:

(i) The time-limit to launch a complaint contained in the Agreement is "not less than 10 days" from the time when the basis of the complaint is known or reasonably should have been known. What are the limits in your domestic legislation?

(ii) What body is responsible for the challenge procedures? Is this a "court" or an "impartial and independent review body"? If the latter:

- How are its members selected?
- Are its decisions subject to judicial review?
- If not, how will the requirements of paragraph 6 of Article XX be taken into account?

(iii) What is the applicable law by reference to which the challenge body will examine complaints?

(iv) Which rapid interim measures are provided to correct breaches of the Agreement and to preserve commercial opportunities?

- Do these measures include the possibility to suspend the procurement process? On what conditions?

(v) How do challenge procedures provide for correction of the Agreement? What types of compensation for loss or damages suffered can the challenge body order?

(vi) Give any available information on the time-periods for the stages of the challenge process, including to obtain interim measures and a final decision.

(vii) What are the usual costs to conduct a challenge procedure? Are there possibilities foreseen to do so free of charge?

VII. OTHER MATTERS

To what extent is information technology being used in the process of government procurement? Are notices of invitations to tender and/or notices of contract awards published electronically? Please provide the address of such electronic publications.

Is there a contact point in your country for responding to enquiries from suppliers, other governments and the wider public relating to laws, regulations and procedures and practices regarding government procurement at the central and/or sub-central level? Please provide the address.

ANNEX F

WORLD TRADE ORGANIZATION

GPA/W/297
11 December 2006

(06-5935)

Committee on Government Procurement

REVISION OF THE AGREEMENT ON GOVERNMENT PROCUREMENT AS AT 8 DECEMBER 2006

Prepared by the Secretariat

This document contains the text of the revision of the 1994 Agreement on Government Procurement which was referred to by the Chairman of the Committee on Government Procurement in the formal meeting of the Committee on the afternoon of Friday, 8 December 2006.[25]

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PREAMBLE

Parties to this Agreement (hereinafter referred to as "Parties"),

Recognizing the need for an effective multilateral framework for government procurement, with a view to achieving greater liberalization and expansion of, and improving the framework for, the conduct of international trade;

[25] See paragraphs 20-21 of the Committee's Report to the General Council (GPA/89 of 11 December 2006).

Recognizing that measures regarding government procurement should not be prepared, adopted or applied so as to afford protection to domestic suppliers, goods, or services, or to discriminate among foreign suppliers, goods, or services;

Recognizing that the integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources, the performance of the Parties' economies, and the functioning of the multilateral trading system;

Recognizing that the procedural commitments under this Agreement should be sufficiently flexible to accommodate the specific circumstances of each Party;

Recognizing the need to take into account the development, financial, and trade needs of developing countries, in particular the least-developed countries;

Recognizing the importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner, and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption;

Recognizing the importance of using, and encouraging the use of, electronic means for procurement covered by this Agreement;

Desiring to encourage acceptance of and accession to this Agreement by WTO Members not party to it;

Having undertaken further negotiations in pursuance of these objectives;

Hereby *agree* as follows:

ARTICLE I. DEFINITIONS

For purposes of this Agreement:

(a) **commercial goods and services** means goods and services of a type generally sold or offered for sale in the commercial marketplace to, and customarily purchased by, non-governmental buyers for non-governmental purposes;

(b) **construction services contract** means a contract that has as its objective the realization by whatever means of civil or building works, based on Division 51 of the Provisional U.N. Central Product Classification (CPC);

(c) **country or countries** include any separate customs territory that is a Party to this Agreement. In the case of a separate customs territory that is a Party to this Agreement, where an expression in this Agreement is qualified by the term "national", such expression shall be read as pertaining to that customs territory, unless otherwise specified;

(d) **days** means calendar days;

(e) **electronic auction** means an iterative process that involves the use of electronic means for the presentation by suppliers of either new prices, or new values for quantifiable non-price elements of the tender related to the evaluation criteria, or both, resulting in a ranking or re-ranking of tenders;

(f) **in writing** or **written** means any worded or numbered expression that can be read, reproduced, and later communicated. It may include electronically transmitted and stored information;

(g) **limited tendering** means a procurement method where the procuring entity contacts a supplier or suppliers of its choice;

(h) **measure** means any law, regulation, procedure, administrative guidance or practice, or any action of a procuring entity relating to a covered procurement;

(i) **multi-use list** means a list of suppliers that a procuring entity has determined satisfy the conditions for participation in that list, and that the procuring entity intends to use more than once;

(j) **notice of intended procurement** means a notice published by a procuring entity inviting interested suppliers to submit a request for participation, a tender, or both;

(k) **offsets** means any condition or undertaking that encourages local development or improves a Party's balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade, and similar actions or requirements;

(l) **open tendering** means a procurement method where all interested suppliers may submit a tender;

(m) **person** means a natural person or a juridical person;

(n) **procuring entity** means an entity covered under Annex 1, 2, or 3 of Appendix I of each Party;

(o) **qualified supplier** means a supplier that a procuring entity recognizes as having satisfied the conditions for participation;

(p) **selective tendering** means a procurement method where only suppliers satisfying the conditions for participation are invited by the procuring entity to submit a tender;

(q) **services** includes construction services, unless otherwise specified;

(r) **standard** means a document approved by a recognized body, that provides, for common and repeated use, rules, guidelines, or characteristics for goods or services, or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking, or labeling requirements as they apply to a good, service, process, or production method;

(s) **supplier** means a person or group of persons that provides or could provide goods or services;

(t) **technical specification** means a tendering requirement that:

(i) lays down the characteristics of goods or services to be procured, including quality, performance, safety, and dimensions, or the processes and methods for their production or provision; or

(ii) addresses terminology, symbols, packaging, marking, or labeling requirements, as they apply to a good or service.

ARTICLE II. SCOPE AND COVERAGE

APPLICATION OF AGREEMENT

1. This Agreement applies to any measure regarding covered procurement, whether or not it is conducted exclusively or partially by electronic means.

2. For the purposes of this Agreement, covered procurement means procurement for governmental purposes:

(a) of goods, services, or any combination thereof:

(i) as specified in each Party's Appendix I; and

(ii) not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale;

(b) by any contractual means, including purchase; lease; and rental or hire purchase, with or without an option to buy;

(c) for which the value, as estimated in accordance with paragraphs 6 through 8, equals or exceeds the relevant threshold specified in Appendix I, at the time of publication of a notice in accordance with Article VII;

(d) by a procuring entity; and

(e) that is not otherwise excluded from coverage in paragraph 3 or in a Party's Appendix I.

3. Except where provided otherwise in a Party's Appendix I, this Agreement does not apply to:

(a) the acquisition or rental of land, existing buildings, or other immovable property or the rights thereon;

(b) non-contractual agreements or any form of assistance that a Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees, and fiscal incentives;

(c) the procurement or acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities;

(d) public employment contracts;

(e) procurement conducted:

(i) for the specific purpose of providing international assistance, including development aid;

(ii) under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation by the signatory countries of a project; or

(iii) under the particular procedure or condition of an international organization, or funded by international grants, loans, or other assistance where the applicable procedure or condition would be inconsistent with this Agreement.

4. Each Party shall specify the following information in its Appendix I annexes[26]:

(a) in Annex 1, the central government entities whose procurement is covered by this Agreement;

(b) in Annex 2, the sub-central government entities whose procurement is covered by this Agreement;

(c) in Annex 3, all other entities whose procurement is covered by this Agreement;

(d) in Annex 4, the services covered by this Agreement;

(e) in Annex 5, the construction services covered by this Agreement; and

(f) in Annex 6, any General Notes applicable to the annexes of the Party.

5. Where a procuring entity, in the context of covered procurement, requires persons not listed in Appendix I to procure in accordance with particular requirements, Article V shall apply *mutatis mutandis* to such requirements.

VALUATION

6. In estimating the value of a procurement for the purpose of ascertaining whether it is a covered procurement, a procuring entity shall:

(a) neither divide a procurement into separate procurements nor select or use a particular valuation method for estimating the value of a procurement with the intention of totally or partially excluding it from the application of this Agreement; and

(b) include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers, taking into account all forms of remuneration, including:

(i) premiums, fees, commissions, and interest; and

(ii) where the procurement provides for the possibility of option clauses, the estimated maximum total value of the procurement, inclusive of optional purchases.

7. Where an individual requirement for a procurement results in the award of more than one contract, or in the award of contracts in separate parts (hereafter referred to as "recurring procurements"), the calculation of the estimated maximum total value shall be based on:

(a) the value of recurring procurements of the same type of good or service awarded during the preceding 12 months or the procuring entity's preceding fiscal year, adjusted where

[26] Negotiators' Note: The Parties are still considering whether to add a specific Annex on goods to Appendix I.

possible to take into account anticipated changes in the quantity or value of the good or service being procured over the subsequent 12 months; or

(b) the estimated value of recurring procurements of the same type of good or service to be awarded during the 12 months subsequent to the initial contract award or the procuring entity's fiscal year.

8. In the case of procurement by lease, rental, or hire purchase of goods or services, or procurement for which a total price is not specified, the basis for valuation shall be:

(a) in the case of a fixed-term contract:

(i) where the term of the contract is 12 months or less, the total estimated maximum value for its duration, or

(ii) where the term of the contract exceeds 12 months, the total estimated maximum value, including any estimated residual value;

(b) where the contract is for an indefinite period, the estimated monthly installment multiplied by 48; and

(c) where is it not certain whether the contract is to be a fixed-term contract, subparagraph (b) shall be used.

ARTICLE III. EXCEPTIONS TO THE AGREEMENT

1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition, or war materials, or to procurement indispensable for national security or for national defense purposes.

2. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures:

(a) necessary to protect public morals, order, or safety;

(b) necessary to protect human, animal or plant life or health;

(c) necessary to protect intellectual property; or

(d) relating to goods or services of persons with disabilities, philanthropic institutions, or prison labor.

ARTICLE IV. DEVELOPING COUNTRIES

1. In negotiations on accession to, and in the implementation and administration of, this Agreement, the Parties shall give special consideration to the development, financial, and trade needs and circumstances of developing countries and least-developed countries (collectively referred to hereafter as "developing countries", unless specifically identified otherwise), recognizing that these may differ significantly from country to country. As provided for in this Article and upon request, the Parties shall accord special and differential treatment to:

(a) least-developed countries; and

(b) any other developing country, where and to the extent that this special and differential treatment meets its development needs.

2. Upon accession by a developing country to this Agreement, each Party shall provide immediately to the goods, services, and suppliers of that country the most favourable coverage that the Party provides under Appendix I to any other Party to this Agreement, subject to any terms negotiated between that Party and the developing country in order to maintain an appropriate balance of opportunities under this Agreement.

3. Based on its development needs, and with the agreement of the Parties, a developing country may adopt or retain one or more of the following transitional measures, during a transition period and in accordance with a schedule, set out in an Annex to its Appendix I, and in a manner that does not discriminate among the Parties:

(a) a price preference program, provided that the program:

(i) provides a preference only for the part of the tender incorporating goods or services originating in the developing country applying the preference or goods or services originating in other developing countries in respect of which the developing country applying the preference has an obligation to provide national treatment under a preferential agreement; and

(ii) is transparent, and the preference and its application in the procurement are clearly described in the notice of intended procurement;

(b) an offset, provided that any requirement for, or consideration of, the imposition of the offset is

clearly stated in the notice of intended procurement;

(c) the phased-in addition of specific entities or sectors; and

(d) a threshold that is higher than its permanent threshold.

4. In negotiations on accession to this Agreement, the Parties may agree to the delay of the application of any specific obligation in this Agreement, other than Article V:1(b), by an acceding developing country while that country completes its implementation of the obligation. The implementation period shall be for:

(a) a least-developed country, five years after its accession to this Agreement; and

(b) any other developing country, only the period necessary to implement the specific obligation, but not to exceed three years.

5. Any developing country that has been permitted a period in which to implement an obligation under paragraph 4 shall list in an Annex to its Appendix I the implementation period, the specific obligation subject to the implementation period, and any interim obligation with which it agrees to comply during the implementation period.

6. After this Agreement has entered into force for a developing country, the Committee, on request of the developing country, may:

(a) extend the transition period for a measure permitted under paragraph 3 or the implementation period permitted under paragraph 4; or

(b) approve the application of a new transitional measure permitted under paragraph 3, in special circumstances that were unforeseen during the accession process.

7. A developing country benefiting from a transitional measure provided for in paragraphs 3 or 6, or an implementation period provided for in paragraph 4, or any extension thereof under paragraph 6 shall take such steps during the transition period or implementation period as may be necessary to ensure that it is in compliance with this Agreement at the end of any such period. The developing country shall promptly notify the Committee of such steps.

8. The Parties shall give due consideration to any request by a developing country for technical cooperation and capacity building in relation to that country's accession to, or implementation of, this Agreement.

9. The Committee may develop procedures for the implementation of this Article. Such procedures may include provisions for voting on decisions relating to requests under paragraph 6.

10. The Committee shall review the operation and effectiveness of this Article every five years.

ARTICLE V. GENERAL PRINCIPLES

NATIONAL TREATMENT AND NON-DISCRIMINATION

1. With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to:

(a) domestic goods, services, and suppliers; and

(b) goods, services, and suppliers of any other Party.

2. With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not:

(a) treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation or ownership; nor

(b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of any other Party.

USE OF ELECTRONIC MEANS

3. When conducting covered procurement by electronic means, a procuring entity shall:

(a) ensure that the procurement is conducted using information technology systems and software, including those related to authentication and encryption of information, that are generally available and interoperable with other generally available information technology systems and software; and

(b) maintain mechanisms that ensure the integrity of requests for participation and tenders, including establishment of the time of receipt and the prevention of inappropriate access.

CONDUCT OF PROCUREMENT

4. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:

(a) is consistent with this Agreement, using methods such as open tendering, selective tendering, and limited tendering;

(b) avoids conflicts of interest; and

(c) prevents corrupt practices.

RULES OF ORIGIN

5. For purposes of covered procurement, no Party may apply rules of origin to goods or services imported from or supplied by another Party that are different from the rules of origin the Party applies at the same time in the normal course of trade to imports or supplies of the same goods or services from the same Party.

OFFSETS

6. With regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of, impose, or enforce offsets.

MEASURES NOT SPECIFIC TO PROCUREMENT

7. The provisions of paragraphs 1 and 2 shall not apply to customs duties and charges of any kind imposed on, or in connection with, importation, the method of levying such duties and charges, other import regulations or formalities, and measures affecting trade in services other than measures governing covered procurement.

ARTICLE VI. INFORMATION ON THE PROCUREMENT SYSTEM

1. Each Party shall:

(a) promptly publish any law, regulation, judicial decision, administrative ruling of general application, standard contract clauses mandated by law or regulation and incorporated by reference in notices and tender documentation, and procedure regarding covered procurement, and any modifications

thereof, in an officially designated electronic or paper medium that is widely disseminated and remains readily accessible to the public; and

(b) provide an explanation thereof to any Party, on request.

2. Each Party shall list:

(a) in Appendix II, the electronic or paper media in which the Party publishes the information regarding the Party's procurement system as required by paragraph 1;

(b) in Appendix III, the electronic or paper media in which the Party publishes the notices

required by Articles VII, IX:7, and XVI:2; and

(c) in Appendix IV, the website address or addresses where the Party publishes:

(i) its procurement statistics pursuant to Article XVI:5, as a substitute for the submission of the data required under Article XVI:4;

(ii) its notices concerning awarded contracts pursuant to Article XVI:6, as a substitute for the report required under Article XVI:4.

3. Each Party shall promptly notify the Committee of any modification to the Party's information listed in Appendix II, III, or IV.

ARTICLE VII. NOTICES

NOTICE OF INTENDED PROCUREMENT

1. For each covered procurement, except in the circumstances described in Article XIII, a procuring entity shall publish a notice of intended procurement in the appropriate paper or electronic medium listed in Appendix III. Such medium shall be widely disseminated and such notices shall remain readily accessible to the public, at least, until expiration of the time period indicated in the notice. The notices shall:

(a) for procuring entities in Annex 1, be accessible by electronic means free of charge, for at least any minimum period of time specified in Appendix III, through a single point of access; and

(b) for procuring entities in Annexes 2 and 3, where accessible by electronic means, be provided, at least, through links in a gateway electronic site that is accessible free of charge.

Parties, including their procuring entities in Annexes 2 and 3, are encouraged to publish their notices by electronic means free of charge through a single point of access.

2. Except as otherwise provided in this Agreement, each notice of intended procurement shall include:

(a) the name and address of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement, and their cost and terms of payment, if any;

(b) a description of the procurement, including the nature and the quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity;

(c) for recurring contracts, if possible, an estimate of the timing of subsequent notices of intended procurement;

(d) a description of any options;

(e) the time-frame for delivery of goods or services or the duration of the contract;

(f) the procurement method that will be used and whether it will involve negotiation or electronic auction;

(g) where applicable, the address and any final date for the submission of requests for participation in the procurement;

(h) the address and the final date for the submission of tenders;

(i) the language or languages in which tenders or requests for participation must be submitted, if other than an official language of the Party of the procuring entity;

(j) a list and brief description of any conditions for participation of suppliers, including any requirements for specific documents or certifications to be provided by suppliers in connection therewith, unless such requirements are included in tender documentation that is made available to all interested suppliers at the same time as the notice of intended procurement;

(k) where, pursuant to Article IX, a procuring entity intends to select a limited number of qualified suppliers to be invited to tender, the criteria that will be used to select them and, where applicable, any limitation on the number of suppliers that will be permitted to tender; and

(l) an indication that the procurement is covered by this Agreement.

SUMMARY NOTICE

3. For each case of intended procurement, a procuring entity shall publish a summary notice that is readily accessible, at the same time as the publication of the notice of intended procurement, in one of the WTO languages. The notice shall contain at least the following information:

(a) the subject-matter of the procurement;

(b) the final date for the submission of tenders or, where applicable, any final date for the submission of requests for participation in the procurement or for inclusion on a multi-use list; and

(c) the address from which documents relating to the procurement may be requested.

NOTICE OF PLANNED PROCUREMENT

4. Procuring entities are encouraged to publish in the appropriate paper or electronic medium listed in Appendix III as early as possible in each fiscal year a notice regarding their future procurement plans. The notice should include the subject-matter of the procurement and the planned date of the publication of the notice of intended procurement.

5. A procuring entity in Annex 2 or 3 may use a notice of planned procurement as a notice of intended procurement provided that it includes as much of the information in paragraph 2 as is available and a statement that interested suppliers should express their interest in the procurement to the entity.

ARTICLE VIII. CONDITIONS FOR PARTICIPATION

1. A procuring entity shall limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal, commercial, technical, and financial abilities to undertake the relevant procurement.

2. In assessing whether a supplier satisfies the conditions for participation, a procuring entity:

(a) shall evaluate the financial, commercial, and technical abilities of a supplier on the basis of that supplier's business activities both inside and outside the territory of the Party of the procuring entity;

(b) shall base its determination on the conditions that the procuring entity has specified in advance in notices or tender documentation;

(c) may not impose the condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by a procuring entity of a given Party; and

(d) may require relevant prior experience where essential to meet the requirements of the procurement.

3. Where there is supporting evidence, a Party, including its procuring entities, may exclude a supplier on grounds such as:

(a) bankruptcy;

(b) false declarations;

(c) significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts;

(d) final judgments in respect of serious crimes or other serious offences;

(e) professional misconduct or acts or omissions that adversely reflect upon the commercial integrity of the supplier; or

(f) failure to pay taxes.

ARTICLE IX. QUALIFICATION OF SUPPLIERS

REGISTRATION SYSTEMS AND QUALIFICATION PROCEDURES

1. A Party, including its procuring entities, may maintain a supplier registration system where interested suppliers are required to register and provide certain information.

2. Each Party shall ensure that:

(a) its procuring entities make efforts to minimize differences in their qualification procedures; and

(b) where its procuring entities maintain registration systems, the entities make efforts to minimize differences in their registration systems.

3. A Party, including its procuring entities, shall not adopt or apply any registration system or qualification procedure with the purpose or the effect of creating unnecessary obstacles to the participation of foreign suppliers in its procurement.

SELECTIVE TENDERING

4. Where a procuring entity intends to use selective tendering, the entity shall:

(a) in the notice of intended procurement include at least the information in Article VII:2(a), (b), (f), (g), (j), (k), and (l) and invite suppliers to submit a request for participation; and

(b) by the commencement of the time-period for tendering, provide at least the information in Article VII:2 (c), (d), (e), (h), and (i) to the qualified suppliers that it notifies in accordance with Article XI:3(b).

5. A procuring entity shall recognize as a qualified supplier any domestic supplier and any supplier of another Party that meets the conditions for participation in a particular procurement, unless the procuring entity states in the notice of intended procurement any limitation on the number of suppliers that will be permitted to tender and the criteria for selecting the limited number of suppliers.

6. Where the tender documentation is not made publicly available from the date of publication of the notice referred to in paragraph 4, a procuring entity shall ensure that those documents are made available at the same time to all the qualified suppliers selected in accordance with paragraph 5.

MULTI-USE LISTS

7. A procuring entity may maintain a multi-use list of suppliers, provided that a notice inviting interested suppliers to apply for inclusion on the list is:

(a) published annually; and

(b) where published by electronic means, made available continuously,

in the appropriate medium listed in Appendix III.

8. The notice provided for in paragraph 7 shall include:

(a) a description of the goods or services, or categories thereof, for which the list may be used;

(b) the conditions for participation to be satisfied by suppliers and the methods that the procuring entity will use to verify a supplier's satisfaction of the conditions;

(c) the name and address of the procuring entity and other information necessary to contact the entity and obtain all relevant documents relating to the list;

(d) the period of validity of the list and the means for its renewal or termination, or where the period of validity is not provided, an indication of the method by which notice will be given of the termination of use of the list; and

(e) an indication that the list may be used for procurement covered by this Agreement.

9. Notwithstanding paragraph 7, where a multi-use list will be valid for three years or less, a procuring entity may publish the notice referred to in paragraph 7 only once, at the beginning of the period of validity of the list, provided that the notice:

(a) states the period of validity and that further notices will not be published; and

(b) is published by electronic means and is made available continuously during the period of its validity.

10. A procuring entity shall allow suppliers to apply at any time for inclusion on a multi-use list and shall include on the list all qualified suppliers within a reasonably short time.

11. Where a supplier that is not included on a multi-use list submits a request for participation in a procurement based on a multi-use list and all required documents relating thereto, within the time-period provided for in Article XI:2, a procuring entity shall examine the request. The procuring entity may not exclude the supplier from consideration in respect of the procurement on the grounds that the entity has insufficient time to examine the request, unless, in exceptional cases, due to the complexity of the procurement, the entity is not able to complete the examination of the request within the time-period allowed for the submission of tenders.

ANNEXES 2 AND 3 ENTITIES

12. A procuring entity listed in Annex 2 or 3 may use a notice inviting suppliers to apply for inclusion on a multi-use list as a notice of intended procurement, provided that:

(a) the notice is published in accordance with paragraph 7 and includes the information in paragraph 8, as much of the information in Article VII:2 as is available, and a statement that it constitutes a notice of intended procurement or that only the suppliers on the multi-use list will receive further notices of procurement covered by the multi-use list;

(b) the entity promptly provides to suppliers that have expressed an interest to the entity in a given procurement, sufficient information to permit them to assess their interest in the procurement, including all remaining information required in Article VII:2, to the extent such information is available; and

(c) a supplier having applied for inclusion on a multi-use list in accordance with paragraph 10 may be allowed to tender in a given procurement, where there is sufficient time for the procuring entity to examine whether it satisfies the conditions for participation.

INFORMATION ON PROCURING ENTITY DECISIONS

13. A procuring entity shall promptly inform any supplier that submits a request for participation or application for inclusion on a multi-use list of the procuring entity's decision with respect to the request.

14. Where a procuring entity rejects a supplier's request for participation or application for inclusion on a multi-use list, ceases to recognize a supplier as qualified, or removes a supplier from a multi-use list, the entity shall promptly inform the supplier and, on request of the supplier, promptly provide the supplier with a written explanation of the reasons for its decision.

ARTICLE X. TECHNICAL SPECIFICATIONS AND TENDER DOCUMENTATION

TECHNICAL SPECIFICATIONS

1. A procuring entity shall not prepare, adopt, or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to international trade.

2. In prescribing the technical specifications for the goods or services being procured, a procuring entity shall, where appropriate:

(a) specify the technical specification in terms of performance and functional requirements, rather than design or descriptive characteristics; and

(b) base the technical specification on international standards, where such exist; otherwise, on national technical regulations, recognized national standards, or building codes.

3. Where design or descriptive characteristics are used in the technical specifications, a procuring entity should indicate, where appropriate, that it will consider tenders of equivalent goods or services that demonstrably fulfill the requirements of the procurement by including words such as "or equivalent" in the tender documentation.

4. A procuring entity shall not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, copyright, design, type, specific origin, producer, or supplier, unless

there is no other sufficiently precise or intelligible way of describing the procurement requirements and provided that, in such cases, the entity includes words such as "or equivalent" in the tender documentation.

5. A procuring entity shall not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement.

6. For greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt, or apply technical specifications to promote the conservation of natural resources or protect the environment.

TENDER DOCUMENTATION

7. A procuring entity shall provide to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. Unless already provided in the notice of intended procurement, such documentation shall include a complete description of:

(a) the procurement, including the nature and the quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity and any requirements to be fulfilled, including any technical specifications, conformity assessment certification, plans, drawings, or instructional materials;

(b) any conditions for participation of suppliers, including a list of information and documents that suppliers are required to submit in connection therewith;

(c) all evaluation criteria to be considered in the awarding of the contract, and, except where price is the sole criterion, the relative importance of such criteria;

(d) where the procuring entity will conduct the procurement by electronic means, any authentication and encryption requirements or other requirements related to the receipt of information by electronic means;

(e) where the procuring entity will hold an electronic auction, the rules, including identification of the elements of the tender related to the evaluation criteria, on which the auction will be conducted;

(f) where there will be a public opening of tenders, the date, time, and place for the opening and, where appropriate, the persons authorized to be present;

(g) any other terms or conditions, including terms of payment and any limitation on the means by which tenders may be submitted, e.g., paper or electronic means; and

(h) any dates for the delivery of goods or the supply of services.

8. In establishing any delivery date for the goods or services being procured, a procuring entity shall take into account such factors as the complexity of the procurement, the extent of subcontracting anticipated and the realistic time required for production, de-stocking and transport of goods from the point of supply or for supply of services.

9. The evaluation criteria set out in the notice or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics, and terms of delivery.

10. A procuring entity shall promptly:

(a) make available tender documentation to ensure that interested suppliers have sufficient time to submit responsive tenders;

(b) provide, on request, the tender documentation to any interested supplier; and

(c) reply to any reasonable request for relevant information by any interested or participating supplier, provided that such information does not give that supplier an advantage over other suppliers.

MODIFICATIONS

11. Where, prior to the award of a contract, a procuring entity modifies the criteria or technical requirements set out in a notice or tender documentation provided to participating suppliers, or

amends or reissues a notice or tender documentation, it shall transmit in writing all such modifications or amended or re-issued notice or tender documentation:

(a) to all suppliers that are participating at the time the information is amended, if known, and in all other cases, in the same manner as the original information; and

(b) in adequate time to allow such suppliers to modify and re-submit amended tenders, as appropriate.

ARTICLE XI. TIME-PERIODS

GENERAL

1. A procuring entity shall, consistent with its own reasonable needs, provide sufficient time for suppliers to prepare and submit requests for participation and responsive tenders, taking into account such factors as:

(a) the nature and complexity of the procurement;

(b) the extent of subcontracting anticipated; and

(c) the time for transmitting tenders from foreign as well as domestic points where electronic means are not used.

Such time-periods, including any extension of the time-periods, shall be common for all interested or participating suppliers.

DEADLINES

2. A procuring entity that uses selective tendering shall establish that the final date for the submission of requests for participation shall not, in principle, be less than 25 days from the date of publication of the notice of intended procurement. Where a state of urgency duly substantiated by the procuring entity renders this time-period impracticable, the time-period may be reduced to not less than 10 days.

3. Except as provided for in paragraphs 4 and 5, a procuring entity shall establish that the final date for the submission of tenders shall not be less than 40 days from the date on which:

(a) in the case of open tendering, the notice of intended procurement is published; or

(b) in the case of selective tendering, the entity notifies suppliers that they will be invited to submit tenders, whether or not it uses a multi-use list.

4. A procuring entity may reduce the time-period for tendering set out in paragraph 3 to not less than 10 days where:

(a) the procuring entity published a notice of planned procurement under Article VII:4 at least 40 days and not more than 12 months in advance of the publication of the notice of intended procurement, and the notice of planned procurement contains:

(i) a description of the procurement;

(ii) the approximate final dates for the submission of tenders or requests for participation;

(iii) a statement that interested suppliers should express their interest in the procurement to the procuring entity;

(iv) the address from which documents relating to the procurement may be obtained; and

(v) as much of the information that is required under Article VII:2 for the notice of intended procurement, as is available;

(b) the procuring entity, for procurements of a recurring nature, indicates in an initial notice of intended procurement that subsequent notices will provide time periods for tendering based on this paragraph; or

(c) a state of urgency duly substantiated by the procuring entity renders such time-period impracticable.

5. A procuring entity may reduce the time-period for tendering set out in paragraph 3 by five days for each one of the following circumstances:

(a) the notice of intended procurement is published by electronic means;

(b) all the tender documentation is made available by electronic means from the date of the publication of the notice of intended procurement; and

(c) the tenders can be received by electronic means by the procuring entity.

6. The use of paragraph 5, in conjunction with paragraph 4, shall in no case result in the reduction of the time-period for tendering set out in paragraph 3 to less than 10 days from the date on which the notice of intended procurement is published.

7. Notwithstanding any other time-period in this Article, where a procuring entity purchases commercial goods or services, it may reduce the time-period for tendering set out in paragraph 3 to not less than 13 days, provided that it publishes by electronic means, at the same time, both the notice of intended procurement and the tender documentation. Where the entity also accepts tenders for commercial goods and services by electronic means, it may reduce the time period set out in paragraph 3 to not less than 10 days.

8. Where a procuring entity in Annex 2 or 3 has selected all or a limited number of qualified suppliers, the time-period for tendering may be fixed by mutual agreement between the procuring entity and the selected suppliers. In the absence of agreement, the period shall not be less than 10 days.

ARTICLE XII. NEGOTIATION

1. A Party may provide for its procuring entities to conduct negotiations:

(a) in the context of procurements in which they have indicated such intent in the notice of intended procurement required under Article VII:2; or

(b) where it appears from the evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set out in the notice or tender documentation.

2. A procuring entity shall:

(a) ensure that any elimination of suppliers participating in negotiations is carried out in accordance with the evaluation criteria set out in the notice or tender documentation; and

(b) where negotiations are concluded, provide a common deadline for the remaining participating suppliers to submit any new or revised tenders.

ARTICLE XIII. LIMITED TENDERING

1. Provided that it does not use this provision for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of the other Parties or protects domestic suppliers, a procuring entity may use limited tendering and may choose not to apply Articles VII through IX, X (paragraphs 7 through 11), XI, XII, XIV, and XV only under the following circumstances:

(a) provided that the requirements of the tender documentation are not substantially modified where:

(i) no tenders were submitted or no suppliers requested participation ;

(ii) no tenders that conform to the essential requirements of the tender documentation were submitted;

(iii) no suppliers satisfied the conditions for participation; or

(iv) the tenders submitted have been collusive;

(b) where the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist for any of the following reasons:

(i) the requirement is for a work of art;

(ii) the protection of patents, copyrights or other exclusive rights; or

(iii) due to an absence of competition for technical reasons;

(c) for additional deliveries by the original supplier of goods and services that were not included in the initial procurement where:

(i) a change of supplier for such additional goods and services can not be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services, or installations procured under the initial procurement; and

(ii) such separation would cause significant inconvenience or substantial duplication of costs to the procuring entity;

(d) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering or selective tendering;

(e) for goods purchased on a commodity market;

(f) where a procuring entity procures a prototype or a first good or service that is developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. Original development of a first good or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the good or service is suitable for production or supply in quantity to acceptable quality standards, but does not include quantity production, or supply to establish commercial viability, or to recover research and development costs;

(g) for purchases made under exceptionally advantageous conditions that only arise in the very short term in the case of unusual disposals such as those arising from liquidation, receivership, or bankruptcy, but not for routine purchases from regular suppliers; and

(h) where a contract is awarded to a winner of a design contest provided that:

(i) the contest has been organized in a manner that is consistent with the principles of this Agreement, in particular relating to the publication of a notice of intended procurement; and

(ii) the participants are judged by an independent jury with a view to a design contract being awarded to a winner.

2. A procuring entity shall prepare a report in writing on each contract awarded under paragraph 1. Each such report shall include the name of the procuring entity, the value and kind of goods or services procured, and a statement indicating the circumstances and conditions described in paragraph 1 that justified the use of limited tendering.

ARTICLE XIV. ELECTRONIC AUCTIONS

Where a procuring entity intends to conduct a covered procurement using an electronic auction, the entity shall provide each participant, before commencing the electronic auction, with:

(a) the automatic evaluation method, including the mathematical formula, that is based on the evaluation criteria set out in the tender documentation and that will be used in the automatic ranking or re-ranking during the auction;

(b) the results of any initial evaluation of the elements of its tender where the contract is to be awarded on the basis of the most advantageous tender; and

(c) any other relevant information relating to the conduct of the auction.

ARTICLE XV. TREATMENT OF TENDERS AND CONTRACT AWARDS

TREATMENT OF TENDERS

1. A procuring entity shall receive, open, and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process, and the confidentiality of tenders.

2. A procuring entity shall not penalize any supplier whose tender is received after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the procuring entity.

3. When a procuring entity provides suppliers with opportunities to correct unintentional errors of form between the opening of tenders and the awarding of the contract, the procuring entity shall provide the same opportunities to all participating suppliers.

AWARDING OF CONTRACTS

4. To be considered for award, a tender must be in writing and must, at the time of opening, comply with the essential requirements of the notices and tender documentation and be from a supplier that satisfies the conditions for participation.

5. Unless a procuring entity determines that it is not in the public interest to award a contract, it shall award the contract to the supplier that the entity has determined to be fully capable of undertaking the contract and, based solely on the evaluation criteria specified in the notices and tender documentation, has submitted:

(a) the most advantageous tender; or

(b) where price is the sole criterion, the lowest price.

6. Where a procuring entity receives a tender with a price that is abnormally lower than the prices in other tenders submitted, it may verify with the supplier that it can comply with the conditions of participation and is capable of fulfilling the terms of the contract.

7. A procuring entity shall not use option clauses, cancel a procurement, or modify awarded contracts in a manner that circumvents the obligations of this Agreement.

ARTICLE XVI. TRANSPARENCY OF PROCUREMENT INFORMATION

INFORMATION PROVIDED TO SUPPLIERS

1. A procuring entity shall promptly inform participating suppliers of the entity's contract award decisions and, on request, in writing. Subject to Article XVII, a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons that the entity did not select its tender and the relative advantages of the successful supplier's tender.

PUBLICATION OF AWARD INFORMATION

2. Not later than 72 days after the award of each contract covered by this Agreement, a procuring entity shall publish a notice in the appropriate paper or electronic medium listed in Appendix III. Where only an electronic medium is used, the information shall remain readily accessible for a reasonable period of time. The notice shall include at least the following information:

(a) a description of the goods or services procured;

(b) the name and address of the procuring entity;

(c) the name and address of the successful supplier;

(d) the value of the successful tender or the highest and lowest offers taken into account in the award of the contract;

(e) the date of award; and

(f) the type of procurement method used, and in cases where limited tendering was used pursuant to Article XIII, a description of the circumstances justifying the use of limited tendering.

MAINTENANCE OF DOCUMENTATION, REPORTS, AND ELECTRONIC TRACEABILITY

3. Each procuring entity shall, for a period of at least three years from the award of the contract maintain:

(a) documentation and reports of tendering procedures and contract awards relating to covered procurement, including the reports required under Article XIII; and

(b) data that ensure the appropriate traceability of the conduct of covered procurement by electronic means.

COLLECTION AND REPORT OF STATISTICS

4. Each Party shall collect and report to the Committee statistics on its contracts covered by this Agreement. Each report shall cover one year and be submitted within two years of the end of the reporting period, and shall contain:

(a) for Annex 1 procuring entities:

(i) the number and total value, for all such entities, of contracts covered by this Agreement;

(ii) the number and total value of all contracts covered by this Agreement awarded by such entities, broken down by categories of goods and services according to an internationally recognized uniform classification system; and

(iii) the number and total value of contracts covered by this Agreement awarded by each such entity under limited tendering;

(b) for Annex 2 and 3 procuring entities, the number and total value of contracts covered by this Agreement awarded by all such entities, broken down by Annex; and

(c) estimates for the information required under subparagraphs (a) and (b), with an explanation of the methodology used to develop the estimates, where it is not feasible to provide the data.

5. Where a Party publishes its statistics on an official website, the Party may substitute a notification of the website address for the submission of the data under paragraph 4, with any instructions necessary to access and use such statistics, in accordance with the requirements of paragraph 4 .

6. Where a Party requires notices concerning awarded contracts, pursuant to paragraph 2, to be published electronically and where such notices are accessible to the public through a single database in a form permitting analysis of the covered contracts, the Party may substitute a notification of the website address for the submission of the data under paragraph 4, with any instructions necessary to access and use such data.

ARTICLE XVII. DISCLOSURE OF INFORMATION

PROVISION OF INFORMATION TO PARTIES

1. On request of any other Party, a Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially, and in accordance with this Agreement, including information on the characteristics and relative advantages of the successful tender. In cases where release of the information would prejudice competition in future tenders, the Party that receives that information shall not disclose it to any supplier, except after consultation with, and agreement of, the Party that provided the information.

NON-DISCLOSURE OF INFORMATION

2. Notwithstanding any other provision of this Agreement, a Party, including its procuring entities, may not provide information to a particular supplier that might prejudice fair competition between suppliers.

3. Nothing in this Agreement shall be construed to require a Party, including its procuring entities, authorities, and review bodies, to release confidential information under this Agreement where release:

(a) would impede law enforcement;

(b) might prejudice fair competition between suppliers;

(c) would prejudice the legitimate commercial interests of particular persons, including the protection of intellectual property; or

(d) would otherwise be contrary to the public interest.

ARTICLE XVIII. DOMESTIC REVIEW PROCEDURES FOR SUPPLIER CHALLENGES

1. Each Party shall provide a timely, effective, transparent, and non-discriminatory administrative or judicial review procedure through which a supplier may challenge:

(a) a breach of the Agreement; or

(b) where the supplier does not have a right to challenge directly a breach of the Agreement under the domestic law of a Party, a failure to comply with a Party's measures implementing this Agreement, arising in the context of a covered procurement, in which it has, or has had, an interest. The procedural rules for all challenges shall be in writing and made generally available.

2. In the event of a complaint by a supplier, arising in the context of covered procurement in which the supplier has, or has had, an interest, that there has been a breach of this Agreement or, where the supplier does not have a right to challenge directly a breach of this Agreement under the domestic law of a Party, a failure to comply with a Party's measures implementing this Agreement, each Party shall encourage the procuring entity and supplier to seek resolution of the complaint through consultations. The procuring entity shall accord impartial and timely consideration to any such complaint in a manner that is not prejudicial to the supplier's participation in ongoing or future procurement or right to seek corrective measures under the administrative or judicial review procedure.

3. Each supplier shall be allowed a sufficient period of time to prepare and submit a challenge, which in no case shall be less than 10 days from the time when the basis of the challenge became known or reasonably should have become known to the supplier.

4. Each Party shall establish or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of a covered procurement.

5. Where a body other than an authority referred to in paragraph 4 initially reviews a challenge, the Party shall ensure that the supplier may appeal the initial decision to an impartial administrative or judicial authority that is independent of the procuring entity whose procurement is the subject of the challenge.

6. A review body that is not a court shall either be subject to judicial review or have procedures that provide that:

(a) the procuring entity shall respond in writing to the challenge and disclose all relevant documents to the review body;

(b) the participants to the proceedings ("participants") shall have the right to be heard prior to a decision of the review body being made on the challenge;

(c) the participants shall have the right to be represented and accompanied;

(d) the participants shall have access to all proceedings;

(e) the participants shall, have the right to request that the proceedings take place in public and that witnesses may be presented; and

(f) decisions or recommendations relating to supplier challenges shall be provided, in a timely fashion, in writing, with an explanation of the basis for each decision or recommendation.

7. Each Party shall adopt or maintain procedures that provide for:

(a) rapid interim measures to preserve the supplier's opportunity to participate in the procurement. Such interim measures may result in suspension of the procurement process. The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether such measures should be applied. Just cause for not acting shall be provided in writing; and

(b) where a review body has determined that there has been a breach of this Agreement or, where the supplier does not have a right to challenge directly a breach of this Agreement under the domestic law of a Party, a failure by a procuring entity to comply with a Party's measures implementing this Agreement, corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both.

ARTICLE XIX. MODIFICATIONS AND RECTIFICATIONS TO COVERAGE

NOTIFICATION OF PROPOSED MODIFICATION

1. A Party shall notify the Committee of any proposed rectification, transfer of an entity from one Annex to another, withdrawal of an entity, or other modification (referred to generally in this Article as "modification") of Appendix I. The Party proposing the modification ("modifying Party") shall include in the notification:

(a) for any proposed withdrawal of an entity from Appendix I in exercise of its rights on the grounds that government control or influence over the entity's covered procurement has been effectively eliminated, evidence of such elimination; or

(b) for any other proposed modification, information as to the likely consequences of the change for the mutually agreed coverage provided in this Agreement.

OBJECTION TO NOTIFICATION

2. Any Party whose rights under this Agreement may be affected by a proposed modification notified under paragraph 1 may notify the Committee of any objection to the proposed modification. Such objections shall be made within 45 days from the date of the circulation to the Parties of the notification, and shall set out reasons for the objection.

CONSULTATIONS

3. The modifying Party and any Party making an objection ("objecting Party") shall make every attempt to resolve the objection through consultations. In such consultations, the modifying and objecting Parties shall consider the proposed modification:

(a) in the case of a notification under paragraph 1(a), in accordance with any indicative criteria adopted pursuant to paragraph 8 indicating the effective elimination of government control or influence over an entity's covered procurement; and

(b) in the case of a notification under paragraph 1(b), in accordance with any criteria adopted pursuant to paragraph 8 relating to the level of compensatory adjustments to be offered for modifications, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in this Agreement.

REVISED MODIFICATION

4. Where the modifying Party and any objecting Party resolve the objection through consultations, and the modifying Party revises its proposed modification as a result of those consultations, the modifying Party shall notify the Committee in accordance with paragraph 1, and any such revised modification shall only be effective after fulfilling the requirements of this Article.

IMPLEMENTATION OF MODIFICATIONS

5. A proposed modification shall become effective only where:

(a) no Party submits to the Committee a written objection to the proposed modification within 45 days from the date of circulation of the notification of the proposed modification under paragraph 1;

(b) all objecting Parties have notified the Committee that they withdraw their objections to the proposed modification; or

(c) 150 days from the date of circulation of the notification of the proposed modification under paragraph 1 have elapsed, and the modifying Party has informed the Committee of its intention to implement the modification.

WITHDRAWAL OF SUBSTANTIALLY EQUIVALENT COVERAGE

6. Where a modification becomes effective pursuant to paragraph 5(c), any objecting Party may withdraw substantially equivalent coverage. Notwithstanding Article V:1(b), a withdrawal pursuant to this paragraph may be implemented solely with respect to the modifying Party. Any objecting Party shall inform the Committee of any such withdrawal at least 30 days before the withdrawal becomes effective. A withdrawal pursuant to this paragraph shall be consistent with any criteria relating to the level of compensatory adjustment adopted by the Committee pursuant to paragraph 8.

ARBITRATION PROCEDURES TO FACILITATE RESOLUTION OF OBJECTIONS

7. Where the Committee has adopted arbitration procedures to facilitate the resolution of objections pursuant to paragraph 8, a modifying or any objecting Party may invoke the arbitration procedures within 120 days of circulation of the notification of the proposed modification.

(a) Where no Party has invoked the arbitration procedures within the time-period:

(i) notwithstanding paragraph 5(c), the proposed modification shall become effective where 130 days from the date of circulation of the notification of the proposed modification under paragraph 1 have elapsed, and the modifying Party has informed the Committee of its intention to implement the modification; and

(ii) no objecting Party may withdraw coverage pursuant to paragraph 6.

(b) Where a modifying Party or objecting Party has invoked the arbitration procedures:

(i) notwithstanding paragraph 5(c), the proposed modification shall not become effective before the completion of the arbitration procedures;

(ii) any objecting Party that intends to enforce a right to compensation, or to withdraw substantially equivalent coverage pursuant to paragraph 6, shall participate in the arbitration proceedings;

(iii) a modifying Party should comply with the results of the arbitration procedures in making any modification effective pursuant to paragraph 5(c); and

(iv) where a modifying Party does not comply with the results of the arbitration procedures in making any modification effective pursuant to paragraph 5(c), any objecting Party may withdraw substantially equivalent coverage pursuant to paragraph 6, provided that any such withdrawal is consistent with the result of the arbitration procedures.

COMMITTEE RESPONSIBILITIES

8. The Committee shall adopt:

(a) arbitration procedures to facilitate resolution of objections under paragraph 2:

(b) indicative criteria that demonstrate the effective elimination of government control or influence over an entity's covered procurement; and

(c) criteria that indicate how to determine the level of compensatory adjustment to be offered for modifications made pursuant to paragraph 1(b) and substantially equivalent coverage under paragraph 6.

ARTICLE XX. CONSULTATIONS AND DISPUTE SETTLEMENT

1. Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for, consultation regarding such representations as may be made by another Party with respect to any matter affecting the operation of this Agreement.

2. Where any Party considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the attainment of any objective of this Agreement is being impeded as the result of:

(a) the failure of another Party or Parties to carry out its obligations under this Agreement; or

(b) the application by another Party or Parties of any measure, whether or not it conflicts with the provisions of this Agreement,

it may with a view to reaching a mutually satisfactory solution to the matter, have recourse to the provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as "the Dispute Settlement Understanding").

3. The Dispute Settlement Understanding applies to consultations and the settlement of disputes under this Agreement, with the exception that, notwithstanding paragraph 3 of Article 22 of the Dispute Settlement Understanding, any dispute arising under any Agreement listed in Appendix 1 to the Dispute Settlement Understanding other than this Agreement shall not result in the suspension of concessions or other obligations under this Agreement, and any dispute arising under this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement listed in Appendix 1 of the Dispute Settlement Understanding

ARTICLE XXI. INSTITUTIONS

COMMITTEE ON GOVERNMENT PROCUREMENT

1. A Committee on Government Procurement composed of representatives from each of the Parties shall be established. This Committee shall elect its own Chairman and shall meet as necessary, but not less than once a year, for the purpose of affording Parties the opportunity to consult on any matters relating to the operation of this Agreement or the furtherance of its objectives, and to carry out such other responsibilities as may be assigned to it by the Parties.

2. The Committee may establish working parties or other subsidiary bodies that shall carry out such functions as may be given to them by the Committee.

3. The Committee shall annually:

(a) review the implementation and operation of this Agreement; and

(b) inform the General Council of the WTO of developments relating to the implementation and operation of this Agreement.

OBSERVERS

4. Any WTO Member that is not a Party to this Agreement shall be entitled to participate in the Committee as an observer upon submission of a written notice to the Secretariat. Any WTO observer may submit a written

request to the Secretariat to participate in the Committee as an observer, and may be accorded observer status by the Committee.

ARTICLE XXII. FINAL PROVISIONS

ACCEPTANCE AND ENTRY INTO FORCE

1. This Agreement shall enter into force on [ ] for those WTO Members whose agreed coverage is set out in Annexes 1 through 6 of Appendix I, and that have, by signature, accepted this Agreement on [ ], or have, by or on that date, signed this Agreement subject to ratification and have subsequently ratified this Agreement before [ ].

TRANSITIONAL ARRANGEMENTS

2. Between the Parties to this Agreement that are also Parties to the Agreement on Government

Procurement dated 15 April 1994 ("1994 Agreement"), the 1994 Agreement shall cease to apply on the date of entry into force of this Agreement for those Parties. When all Parties to the 1994 Agreement have accepted this Agreement, the 1994 Agreement shall be terminated.[27]

3. The provisions of Articles XVIII and XX of this Agreement shall apply to covered procurement that has commenced after the entry into force of this Agreement.[28]

PROVISIONAL APPLICATION

4. A Party to the 1994 Agreement may, notwithstanding its commitments in the 1994 Agreement, maintain or adopt any measure that is consistent with the provisions of this Agreement.[29]

ACCESSION

5. Any Member of the WTO may accede to this Agreement on terms to be agreed between that Member and the Parties. Accession shall take place by deposit with the Director-General of the WTO of an instrument of accession that states the terms so agreed. This Agreement shall enter into force for an acceding Member on the 30th day following the deposit of its instrument of accession the date of its accession to this Agreement.[30]

RESERVATIONS

6. No Party may enter any reservation in respect of any provisions of this Agreement.

NATIONAL LEGISLATION

7. Each Party shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures, and the rules, procedures, and practices applied by its procuring entities, with the provisions of this Agreement.

8. Each Party shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

9. The Parties shall seek to avoid introducing or continuing discriminatory measures and practices that distort open procurement.

FUTURE WORK

10. Not later than the end of [...] from the date of entry into force of this Agreement, and periodically thereafter, the Parties thereto shall undertake further negotiations, with a view to improving the Agreement and achieving the greatest possible extension of its coverage among all Parties, taking into consideration the needs of developing countries.[31]

11. The Parties shall, in the context of the negotiations referred to in paragraph 10, seek to eliminate discriminatory measures which remain on the date of entry into force of this Agreement.[32]

12. Following the conclusion of the work program for the harmonization of rules of origin for goods being undertaken under the Agreement on Rules of Origin in Annex 1A of the Agreement Establishing the World Trade Organization and negotiations regarding trade in services, the Parties shall take the results of that work program and those negotiations into account in amending Article V:5, as appropriate.

13. Not later than the end of the third year from the date of entry into force of this Agreement, the Committee shall undertake further work to consider the advantages and disadvantages of developing common nomenclature for goods and services and standardized notices

14. Beginning two years after entry into force of this Agreement, the Committee shall regularly assess the effective use of Articles XVI:4 and 5.

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[27] Negotiators' Note: The Parties are still considering the need for and the content of this paragraph.

[28] Negotiators' Note: The Parties are still considering the need for and the content of this paragraph.

[29] Negotiators' Note: The Parties are still considering the need for and the content of this paragraph.

[30] Negotiators' Note: The Parties are still considering this paragraph.

[31] Negotiators' Note: The Parties shall review the content of this paragraph before the end of the negotiations.

[32] Negotiators' Note: The Parties shall review the content of this paragraph before the end of the negotiations.

15. Not later than the end of the fifth year from the date of entry into force of this Agreement, the Committee shall examine the applicability of Article XX:2(b).

AMENDMENTS

16. The Parties may amend this Agreement having regard, *inter alia*, to the experience gained in its implementation. Such an amendment, once the Parties have concurred in accordance with the procedures established by the Committee, shall take effect for the Parties that have accepted them upon acceptance by […] of the Parties and thereafter for each other Party upon acceptance by it. [33]

17. Amendments to provisions of this Agreement of a nature that would alter the rights and obligations of the Parties, shall take effect for the Parties that have accepted them upon acceptance by [ ] of the Parties and thereafter for each other Party upon acceptance by it. The Committee may decide by a […] majority of the Parties that any amendment made effective under paragraph 16 is of such a nature that any Party which has not accepted it within a specified period shall be free to withdraw from this Agreement or to remain with the consent of the Committee. [34]

18. Amendments to provisions of this Agreement of a nature that would not alter the rights and obligations of the Parties shall take effect for all Parties upon acceptance by […] of the Parties. [35]

WITHDRAWAL

19. Any Party may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of 60 days from the date the Director-General of the WTO receives written notice of the withdrawal. Any Party may upon such notification request an immediate meeting of the Committee.

20. Where a Party to this Agreement ceases to be a Member of the WTO, it shall cease to be a Party to this Agreement with effect from the same date on which the Party ceases to be a Member of the WTO.

NON-APPLICATION OF THIS AGREEMENT BETWEEN PARTICULAR PARTIES

21. This Agreement shall not apply as between any two Parties where either Party, at the time it accepts or accedes to this Agreement, does not consent to such application.

APPENDICES

22. The Appendices to this Agreement constitute an integral part thereof.

SECRETARIAT

23. This Agreement shall be serviced by the WTO Secretariat.

DEPOSIT

24. This Agreement shall be deposited with the Director-General of the WTO, who shall promptly furnish to each Party a certified true copy of this Agreement, of each rectification or modification thereto pursuant to Article XIX and of each amendment thereto pursuant to paragraph 16, and a notification of each accession thereto pursuant to paragraph 5 and of each withdrawal therefrom pursuant to paragraph 19.

REGISTRATION

25. This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at [ ] this [ ] day of [ ] in a single copy in the English, French and Spanish languages, each text being authentic, except as otherwise specified with respect to the Appendices hereto.

[33] Negotiators' Note: The Parties are still considering the need for and the content of this paragraph.
[34] Negotiators' Note: The Parties are still considering the need for and the content of this paragraph.
[35] Negotiators' Note: The Parties are still considering the need for and the content of this paragraph.

[(DRAFT DECISION)]

Arrangement for the period of co-existence of the 1994 Agreement on Government Procurement and the [2007] Agreement on Government Procurement[36]

The Committee on Government Procurement,

Noting that not all Parties to the Agreement on Government Procurement dated 15 April 1994 (hereinafter referred to as the " 1994 Agreement") may become a Party to the Agreement on Government Procurement done on [… 2007] (hereinafter referred to as the "2007 Agreement") as of its date of entry into force,

Considering that, during the period of co-existence of the 1994 Agreement and the 2007 Agreement, a Party to the 1994 Agreement which has become a Party to the 2007 Agreement should have the right to act in accordance with the provisions of the 2007 Agreement notwithstanding any inconsistency with the provisions of the 1994 Agreement, vis-à-vis Parties to the 1994 Agreement that are not Parties to the 2007 Agreement,

Considering moreover that, during that period of co-existence, a Party to the 1994 Agreement which has become a Party to the 2007 Agreement should not be under a legal obligation to extend the benefits accorded solely under the 2007 Agreement to the Parties of the 1994 Agreement which have not yet become Parties to the 2007 Agreement.

Decides as follows:

1. A Party to the 1994 Agreement that is a Party to the 2007 Agreement may maintain or adopt any measure consistent with the provisions of the 2007 Agreement, notwithstanding the provisions of the 1994 Agreement, vis-à-vis a Party to the 1994 Agreement that is not a Party to the 2007 Agreement until the entry into force for that Party to the 2007 Agreement.

2. A Party to the 1994 Agreement that is a Party to the 2007 Agreement is not under any obligation to accord to goods, services and suppliers of any other Party to the 1994 Agreement that has not yet become a Party to the 2007 Agreement the benefits accorded solely as a result of the commitments or other obligations assumed under the 2007 Agreement.

3. The provisions of Articles XX and XXII of the 1994 Agreement shall not apply in respect of measures referred to in paragraph 1.

4. This Decision shall enter into force on the date of entry into force of the 2007 Agreement.

[36] Negotiators' Note: The Parties are still considering the content of this Decision. Some Parties question the need for this Decision.

PROPOSED DECISION OF THE COMMITTEE ON GOVERNMENT PROCUREMENT

Decision of [day/month/year]

The Committee on Government Procurement,

Noting that the Parties to the GPA have completed negotiations on [the non-market-access-related provisions of] a new Government Procurement Agreement (hereinafter referred to as the "2007 Agreement");

Desiring to ensure the effective operation of Article XIX:1(a) of the 2007 Agreement where a Party proposes the withdrawal of an entity from Appendix I in exercise of its rights, and to enhance the predictability of the Agreement;

Noting that Article XIX:8 of the 2007 Agreement requires that the Committee develop arbitration procedures to facilitate resolution of objections, indicative criteria that demonstrate the effective elimination of government control or influence over an entity's covered procurement, and criteria that indicate how to determine the level of compensatory adjustment to be offered for modifications of coverage under Article XIX of the 2007 Agreement;

Recognizing the extensive work already undertaken by the Committee on the development of arbitration procedures to facilitate resolution of objections and indicative criteria, but also that further work is needed,

Decides as follows:

The Committee shall:

(1) complete the development of arbitration procedures and indicative criteria, with the aim of adopting them by the entry into force of the 2007 Agreement; and

(2) develop criteria that indicate how to determine the level of compensatory adjustment to be offered for modifications of coverage under Article XIX of the 2007 Agreement, with the aim of adopting the criteria within 18 months of entry into force of the 2007 Agreement.

The arbitration procedures shall not become effective until the adoption of the indicative criteria.

ANNEX G

ARV PRICES

- ARV price comparison, the MOH versus the GF Project (Ukraine 2004).
- ARV price comparison, the MOH versus the GF Project (Ukraine 2005).
- ARV prices as of December 2005 (procurement by the MOH and GF-supported project in Ukraine).

ARV price comparison MoH vs GF project

Ukraine 2004

INN of the drug	Form and strength	Trade name, manufacturer	Price per pack, USD			Q-ty, packs	Total paid, USD			Difference, USD	Difference, times
			MoH		GF**		MoH		GF		
			Duties included	Duties excluded			Duties included	Duties excluded			
Zidovudine*	caps 100 mg #100	Zidovir, Cipla Ltd	80.45	76.27	11.88	480	38,616.54	36,608.48	5,702.40	30,906.08	6.42
Lamivudine*	tabs 150 mg #60	Lamivir, Cipla Ltd	169.17	160.38	6.48	492	83,231.64	120,020.37	3188.16	116,832.21	24.75
Lamivudine + Zidovudine*	tabs 150 mg + 300 mg, # 60	Duovir, Cipla Ltd vs Combivir, GSK	300	284.4	20.86	444	133200	126273.6	9261.84	117011.76	13.63
Lamivudine + Zidovudine**	tabs 150 mg + 300 mg, # 60	Duovir, Cipla Ltd vs Combivir, GSK	295.94	280.55	20.86	1800	532692	504990	37548	467442	13.44
Stavudine*	caps 40 mg #60	Stavir, Cipla Ltd	77.82	73.77	6.08	835	64979.7	61597.95	5076.8	56521.15	12.33
Stavudine**	caps 40 mg #60	Stavir, Cipla Ltd	73.65	69.82	6.08	1800	132570	125676	10944	114732	11.48
Efavirenz*	caps 200 mg #30	Efavir, Cipla Ltd	30	28.44	12.84	1152	34,560	32,762.88	14,791.68	17971.2	2.2
Efavirenz**	caps 200 mg #30	Efavir, Cipla Ltd	29.91	28.39	12.84	7200	215,352	204,408.00	92,448.00	111960	2.2
Nevirapine*	tabs 200 mg # 60	Nevimune, Cipla Ltd	225.56	213.83	7.65	144	32480.64	30791.52	1101.6	29689.92	27.95
Nevirapine**	tabs 200 mg # 60	Nevimune, Cipla Ltd	225.34	213.62	7.65	1296	292040.64	276851.52	9914.4	266937.12	27.92
Nevirapine**	oral suspension 10 mg/1 ml, 100 ml #1	Nevimune, Cipla Ltd	37.22	35.28	2.62	864	32158.08	30481.92	2263.68	28218.24	13.47
Nelfinavir*	tabs 250 mg #270	Viracept, Hoffmann-La Roche	344.1	326.21	256.35	930	320013	303372.43	238405.5	64966.93	1.27
Potential economy										**1,423,188.61**	

* - state tender for 2004

** - state tender for 2005

This comparison is made based on prices paid by MoH exluding taxes and duties (5,2%) and the highest prices paid by GF project.

This comparison is based on data of MoH competitive bidding for the program of AIDS prevention and treatment in 2004-2005.

Data is taken from the "National Procurement Bulletin" and price reporting documents of the GF project in Ukraine.

Thus, possible economy that could be reached through transparent ICB makes about $ 1 423 188.

ARV price comparison MoH vs GF project

Ukraine 2005

INN of the drug	Form and strength	Trade name, manufacturer	Price per pack, USD			Q-ty, packs	Total paid		Difference, USD	Difference, times
			MoH		GF**		MoH	GF		
			Excl custom clearance cost	Incl customs clearance costs						
In grey are marked data for the latest MOH Tender										
Lamivudine	10mg/ml oral sol.,vial #1	Epivir, GSK ?	23.91	23.86	7.2					3.31
Lamivudine	tabs 150 mg #60	Lamivir, Cipla Ltd	176.55	176.20	6.48					27.19
Total Lamivudine of two forms							579,793.07			
Didanosine	tabs 100mg #60	Videx, BMS ???	67.26	67.13	23.83	215	14,432.67	5,123.45	9,309.22	2.82
Nelfinavir*	tabs 250 mg #270	Viracept, Roche ???	399.65	398.85	256.35	627	250,193.27	160,804.33	89,388.94	1.56

This comparison is made based on prices paid by MoH and the highest prices paid by GF project.

ARV prices of December 2005 (procurement by MoHand GF supported project in Ukraine)

price comparison

INN	Form and strength	Trade name and manufacturer	Price per pack, UAH		Quantity, packs	Total paid, UAH	Difference, times
			MoH	GF	MoH	MoH	
Lamivudine	10mg/ml oral solution, vial №1	Cipla ltd	16.30	10.8	1305	21,271.50	1.51
Lamivudine	tab. 150 mg №60	Cipla Ltd	33.00	26.81	4503	148,599.00	1.23
Zidovudine + lamivudine	tab. №60	Duovir, Cipla Ltd	90.00	77.5	6576	591,840.00	1.16
Efavirenz	tab.200 mg №30	Efavir, Cipla Ltd	57.00	51.96	29051	1,655,907.00	1.10
Didanosine	tab. 100 mg №60	Divir, Cipla Ltd	84.00	n/a	855	71,820.00	
Lopinavir/ritonavir	caps. 133,3/33,3 mg № 180	Kaletra, Abbott	2520.00	2,272.50	1043.8	2,630,376.00	1.11

Data taken from MoH Decree № 112 of 9.03.06